89-1111

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARLOS ALBERTO BALLBE,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THOMAS A. ELLIOT
(Counsel of Record)
LAW OFFICES OF
THOMAS A. ELLIOT, P.C.
1725 K Street, N.W., Suite 1114
Washington, D.C. 20006
(202) 429-1725

---

60 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's determination when "lawful domicile" terminates for purposes of relief from deportation pursuant to §212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), which conflicts with the other circuits, is incorrect?

2. Whether the Eleventh Circuit's termination of petitioner's "lawful domicile" at a date earlier than a hearing to determine deportability is inconsistent with the due process rights guaranteed to a lawful permanent resident under the fifth amendment to the Constitution?

3. Whether to reject the Eleventh Circuit's position that "lawful domicile" terminates upon the issuance of the Order to Show Cause and before there is a hearing and to accept the administrative agency's long-standing interpretation of when "lawful domicile" terminates?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....(i)

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.....6

CONCLUSION.....20

APPENDIX

(A) OPINION OF COURT OF APPEALS, DATED OCTOBER 18, 1989.....1a

(B) JUDGMENT OF COURT OF APPEALS, DATED OCTOBER 18, 1989.....11a

(C) ORDER OF COURT OF APPEALS DENYING PETITIONER'S MOTION FOR REMAND, FILED OCTOBER 18, 1989.....13a

(D) ORDER OF COURT OF APPEALS DENYING PETITIONER'S SUGGESTION FOR HEARING IN BANC, FILED SEPTEMBER 15, 1989.....14a

(E) DECISION AND ORDER OF THE BOARD OF IMMIGRATION APPEALS, DATED AUGUST 3, 1988.....15a

(F) DECISION OF THE IMMIGRATION JUDGE DENYING PETITIONER'S MOTION TO RECONSIDER, DATED SEPTEMBER 12, 1989.....23a

(G) DECISION OF THE IMMIGRATION JUDGE, DATED AUGUST 28, 1986.....25a

TABLE OF AUTHORITIES

Cases:

Avila-Murrieta v. INS,
762 F.2d 733 (9th Cir. 1985).....6, 14

Bridges v. Wixon,
326 U.S. 135 (1945).....18

Cardoza-Fonseca v. INS,
480 U.S. 421 (1987).....19

Cabasug v. INS,
837 F.2d 880 (9th Cir. 1988).....18

Cheng Fan Kwok v. INS,
392 U.S. 206 (1968).....19

Dabone v. Karn,
763 F.2d 593 (3d Cir. 1985).....6, 11

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948).....18

Francis v. INS,
532 F.2d 268 (2d Cir. 1976).....6, 18

Garcia-Hernandez v. INS,
821 F.2d 222 (5th Cir. 1987).....6, 11, 13

INS v. Errico,
385 U.S. 214 (1966).....19

Japanese Immigrant Case,
189 U.S. 86, 100-101 (1903).....7

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953).....7

Landon v. Plasencia,
459 U.S. 21 (1982).....7

Lennon v. INS,
527 F.2d 187 (2d Cir. 1975).....18

Maldonado-Sandoval v. INS,
518 F.2d 278 (9th Cir. 1975).....15

Marti-Xiques v. INS,
741 F.2d 350 (11th Cir. 1984).....7-8, 16

Matter of Becerra-Miranda,
12 I&N Dec. 358 (BIA 1967).....11

Matter of Duarte,
18 I&N Dec. 329 (BIA 1982).....11

Matter of Granados,
16 I&N Dec. 726 (BIA 1979).....18

Matter of Lok,
18 I&N Dec. 101 (BIA 1981).....8, 10-13

Matter of Mosqueda,
14 I&N Dec. 55 (R.C. 1972).....10

Matter of Silva,
16 I&N Dec. 26 (BIA 1976).....6, 18

Matter of Vilanova-Gonzalez,
13 I&N Dec. 399 (BIA 1969).....11

Matter of Wadud,
Int. Dec. 2980 (BIA 1984).....18

Ng Fung Ho v. White,
259 U.S. 276 (1922).....18

Reid v. INS,
756 F.2d 7 (3d Cir. 1985).....6, 10

Rivera v. INS,
810 F.2d 540 (5th Cir. 1987).....6, 11, 13

Sung v. McGrath,
339 U.S. 33 (1950).....7

Tapia-Acuna v. INS,
640 F.2d 223 (9th Cir. 1981).....18

Tim Lok v. INS,
681 F.2d 107 (2d Cir. 1982).....6, 13

United States v. R.J. Reynolds Tobacco Co.,
416 F.Supp. 316 (D.C.N.J. 1976).....19

Variamparambil v. INS,
831 F.2d 1362 (7th Cir. 1987).....6, 11, 13

Wall v. INS,
722 F.2d 1442 (9th Cir. 1984).....6, 11, 15

Woodby v. INS,
385 U.S. 276 (1966).....17

Constitutional Provisions and Statutes:

Constitution, U.S.:

Amendment V.....7

Immigration and Nationality Laws:

8 U.S.C. § 1101(a)(20).....8-9, 15
8 U.S.C. § 1105a(a)(3).....14-15
8 U.S.C. § 1105a(a)(4).....12
8 U.S.C. § 1182(c)(1988).....4-6
8 U.S.C. § 1251(a)(11).....19
8 U.S.C. § 1252(b).....7

Code of Federal Regulations:

8 C.F.R. § 3.1(b)(2).....11
8 C.F.R. § 242.....7
8 C.F.R. § 242.21.....11, 13
8 C.F.R. § 243.1.....9, 13

United States Code, Generally:

28 U.S.C. § 1254(1)(1988).....2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No.

CARLOS ALBERTO BALLBE,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Carlos Alberto Ballbe, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed the decision and order of the Board of Immigration Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 886 F.2d 306.

The decision and order of the Board of Immigration Appeals was entered on August 3, 1988.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 18, 1989. The jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. [Emphasis added.]

8 U.S.C. § 1182(c) (1988) provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a).

> Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b).

STATEMENT OF THE CASE

The petitioner, Carlos Alberto Ballbe (hereinafter referred to as "Ballbe"), is a 56-year-old native and citizen of Argentina, who entered the United States as a lawful permanent resident on May 12, 1977, and has continuously resided in this country since that time. He made several brief departures from the United States and last entered this country on February 1, 1983. Ballbe's wife and four children are United States citizens or lawful permanent residents. Ballbe was a lawyer, judge, and businessman in Argentina. In this country, he has been a businessman and is in the business of importing and selling foreign cars.

Ballbe was convicted on September 19, 1983, in the United States District Court for the Southern District of Florida, of possession with intent to distribute cocaine. He was sentenced to 2 years of incarceration, followed by a special parole term of 3 years. Ballbe's sentence had 200 days deducted for extra good time and he was released on October 19, 1984.

On November 2, 1983, while Ballbe was incarcerated, an Order to Show Cause was issued by the Immigration and Naturalization Service ("INS") in Ballbe's name. This Order to Show Cause contained a certificate of service but did not indicate the manner of service. Ballbe did not become aware of this Order to Show Cause until approximately May 1984.

On May 31, 1985, Ballbe appeared before the Immigration Judge, denied the charge of deportability, and

challenged the Order to Show Cause on the basis of jurisdiction. At his hearing on June 15, 1985, Ballbe challenged the proper service of the first Order to Show Cause. The Immigration Judge ruled that the notice requirements of due process had been satisfied because Ballbe had eventually become aware of the Order to Show Cause and appeared at his scheduled hearing.

On June 17, 1985, a second Order to Show Cause which amended allegation number 3 was issued and properly served upon Ballbe. On June 24, 1985, Ballbe admitted to the allegations in the second Order to Show Cause and conceded the charge of deportability. Ballbe then presented his application for relief from deportation pursuant to §212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c).

On August 28, 1986, the Immigration Judge found the petitioner deportable as charged, denied his application for a waiver of inadmissibility under §212(c) of the INA, 8 U.S.C. §1182(c), without ruling on the merits of the application, and ordered him deported from the United States. The Immigration Judge, relying on *Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984),* held that Ballbe was ineligible for §212(c) relief because he had not met the statutory prerequisite of 7 consecutive years of lawful unrelinquished domicile in the United States. The Immigration Judge failed to consider the merits of the case and declined to exercise his discretion.

On September 10, 1986, petitioner filed a motion for reconsideration with the Immigration Judge, which was denied on September 12, 1986. On appeal, the order of the Immigration Judge was sustained by the Board of Immigration Appeals ("BIA") in its decision entered August 3, 1988.

On February 1, 1989, Ballbe filed a petition to review the order of the Board of Immigration Appeals with the

United States Court of Appeals for the Eleventh Circuit. The jurisdiction of the Court of Appeals for the Eleventh Circuit was conferred pursuant to 8 U.S.C. §1105a, §106 of the Immigration and Nationality Act.

The Court of Appeals, in its opinion reported at 886 F.2d 306 (11th Cir. 1989), affirmed the Board of Immigration Appeals' decision to dismiss Ballbe's appeal from the decision of the Immigration Judge. The Court of Appeals held that Ballbe's claim for discretionary relief under §212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1988), is barred because Ballbe failed to show that he had maintained lawful unrelinquished domicile in the United States for 7 years *prior to the issuance of the Order to Show Cause.* The Court of Appeals did not consider the merits of Ballbe's §212(c) claim.

Petition for writ of certiorari is now sought for review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THERE EXISTS A CONFLICT IN DECISIONS AMONG THE SECOND, THIRD, FIFTH, SEVENTH, NINTH, AND ELEVENTH CIRCUITS AND THE BOARD OF IMMIGRATION APPEALS AS TO THE ISSUE OF WHEN "LAWFUL DOMICILE" TERMINATES FOR PURPOSES OF THRESHOLD ELIGIBILITY FOR RELIEF FROM DEPORTATION PURSUANT TO §212(C) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. §1182(C).

To be eligible for relief from deportation pursuant to §212(c) of the Immigration and Nationality Act ("INA"), an alien must have maintained a "lawful unrelinquished domicile of seven consecutive years . . . " in this country. INA § 212(c), 8 U.S.C. § 1182(c) (1988); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), accepted by the administrative agency in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976).

The Courts of Appeals in the Second, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have reviewed the issue of when "lawful domicile" terminates for purposes of §212(c) relief. All but the Eleventh Circuit agree that the period stops running when there has been a final finding of deportability. *Tim Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982); *Dabone v. Karn*, 763 F.2d 593, 598 (3d Cir. 1985) (accrual of 7 years stops at least when decision to exclude is administratively final); *Reid v. INS*, 756 F.2d 7, 9 (3d Cir. 1985); *Garcia-Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987); *Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1362, 1367 (7th Cir. 1987); *Avila-Murrieta v. INS*, 762 F.2d 733, 736 (9th Cir. 1985); *Wall v. INS*, 722 F.2d 1442, 1444 (9th Cir. 1984). However, the Second, Third, Fifth, Seventh, and Ninth Circuits

disagree as to what point a finding of deportability is final so as to terminate an alien's lawful residence status and his eligibility to apply for §212(c) relief.

A. The Eleventh Circuit's Holding That an Alien's Accrual of Lawful Domicile in the United States Terminates at a Date Earlier Than a Finding of Deportability is Inconsistent With the Due Process Rights Guaranteed to a Lawful Permanent Resident by the Fifth Amendment.

In the instant case, the Eleventh Circuit applied its prior decision of *Marti-Xiques v. INS*, 741 F.2d 350, 355 (11th Cir. 1984), holding that the period of lawful domicile for eligibility for §212(c) relief is terminated on the date upon which Immigration and Naturalization Service ("INS") commences the deportation proceedings, *i.e.*, when the Order to Show Cause is issued.

An alien within the United States, unlike one applying for entry at the border, is entitled to the full benefits of procedural due process under the aegis of the fifth amendment. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Sung v. McGrath*, 339 U.S. 33 (1950); *Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903).
Moreover, a due process hearing cannot be denied to a lawful permanent resident alien returning to an actual residence in the United States after a brief absence. *Landon v. Plasencia*, 459 U.S. 21 (1982). Consequently, expulsion can be ordered only in accordance with law and after a fair hearing. Section 242(b) of the INA, 8 U.S.C. §1252(b), sets forth procedural patterns for deportation hearings.

The Immigration and Naturalization Service has established a procedure for determining the deportability of persons in the United States. 8 C.F.R. § 242. This set of procedures includes: a) notice of the charges of deportability and of the hearing to defend against those charges; b) a hearing in which the respondent may be

represented by counsel and is permitted to submit evidence, cross-examine witnesses, and have his case heard before an impartial judge; and c) an opportunity for appeal from an adverse decision. The INS has carefully set up a procedure in which it attempts to provide a fair hearing and insure that due process is afforded the alien.

However, the result of the Eleventh Circuit's decision in the instant case and in *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984), is that lawful permanent residents are afforded "notice and hearing" in all deportation/expulsion cases before termination of their status, except those involving §212(c) discretionary relief from deportation. The Eleventh Circuit's ruling in *Marti-Xiques* suggests that somehow an alien's lawful permanent resident status can be terminated before "notice and a fair hearing". Clearly, this was an unintended consequence of the *Marti-Xiques* decision and the decision at bar that should be corrected. Lawful permanent resident status cannot be terminated until an alien is afforded "notice and a fair hearing" consistent with the fifth amendment to the Constitution.

B. All but the Eleventh Circuit Agree that Lawful Domicile Terminates When Lawful Permanent Residence is Relinquished, *i.e.*, When a Finding of Deportability is Final. However, the Circuits Do Not Agree as to When a Finding of Deportability is Final.

The loss of lawful permanent residence status is a necessary corollary to the loss of lawful domicile since it is illogical to conclude that the domicile of one who retains his lawful permanent residence status could be anything but lawful. *Matter of Lok*, 18 I&N Dec. 101, 103 (BIA 1981). The term "lawfully admitted for permanent residence" used in §212(c) is a defined term whose definition is set forth in section 101(a)(20) of the INA, 8 U.S.C. § 1101(a)(20), as follows:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.* (Emphasis added.)

The appropriate inquiry, therefore, is: "At what point in the deportation proceedings does the status of an alien lawfully admitted for permanent residence come to an end?" There are four stages at which the status of an alien "lawfully admitted for permanent residence" may be considered to have changed within the meaning of §101(a)(20) of the INA: a) upon the immigration judge's initial determination of deportability; b) when the immigration judge's order becomes administratively final, *i.e.*, when the Board of Immigration Appeals ("BIA") renders its decision in the case upon appeal or certification or, where no appeal to the BIA is taken, when the appeal is waived or the time allotted for appeal has expired; (c) when a United States Court of Appeals acts upon a petition for review of the BIA's order or the time allowed for filing such petition expires; or d) only upon the execution of the deportation order by the alien's departure, voluntary or enforced, from this country.

8 C.F.R. § 243.1 provides:

> An order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in [deportation] proceedings shall become *final* upon dismissal of an appeal by the BIA, upon waiver of appeal, or upon expiration

> of the time allotted for an appeal when no appeal is taken; or, if such order is issued by the BIA or approved by the BIA upon certification, it shall be final as of the date of the BIA's decision.

While it is settled that an alien who departs the United States under an order of deportation thereby loses his lawful permanent resident status, *Matter of Mosqueda*, 14 I&N Dec. 55 (R.C. 1972), it by no means follows that the alien retains that status, with all the rights that attach thereto, until such departure. *Matter of Lok*, 18 I&N Dec. at 106. For example, a clearly deportable alien who has exhausted all of his administrative and judicial appeal rights but whose departure for some reason cannot be enforced may not continue to accord designated relatives visa preference while he remains in this country. To hold otherwise would produce an anomalous result.

1. Third Circuit Position

The Third Circuit rejected the contention that lawful domicile should be tied to a person's actual departure from the United States. *Reid v. INS*, 756 F.2d 7 (3d Cir. 1985). Accepting this standard would present problems of fairness because it premises the availability of §212(c) discretionary relief on a person's ability to avoid actual deportation pursuant to a finally determined deportation order. Likewise, a person's domicile can hardly be "lawful" once a deportation order has been judicially determined adversely to the alien. *Id.* at 9. The Third Circuit declined in *Reid* to decide precisely at what point in the administrative and judicial process a person's lawful domicile is terminated. Such a decision was unnecessary because even if it was assumed that lawful domicile does not terminate until the merits of the original deportation decision have been fully resolved by the courts, Reid had not met the threshold requirement of 7 consecutive years of domicile. Reid became a lawful permanent resident in

February 1974 and the Circuit Court denied his petition for review of the deportation order in December 1979.

However, setting the cut-off date for termination of lawful permanent resident status upon the immigration judge's initial adjudication of deportability is premature. *Matter of Lok*, 18 I&N Dec. at 106. An alien is entitled as of right to appeal to the BIA from an immigration judge's finding of deportability, the final administrative recourse available to him. 8 C.F.R. §§3.1(b)(2), 242.21. The BIA is not bound by the immigration judge's conclusions but rather has plenary power to review the record *de novo* and to make its own independent determinations on questions of law and fact. *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969); *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967). Therefore, using the date of the immigration judge's initial decision on deportability where an appeal is taken to the BIA would prematurely cut off the alien's lawful permanent resident status.

2. Fifth and Seventh Circuit and BIA Position

The BIA as well as the Fifth and Seventh Circuits have concluded that "lawful permanent residence" is terminated when the order of deportability is administratively final, *i.e.*, the BIA has issued a final order without remand. *See Matter of Lok*, 18 I&N Dec. at 105; *see also Rivera v. INS*, 810 F.2d at 541; *Variamparambil v. INS*, 831 F.2d at 1367; Matter of Duarte, 18 I&N Dec. 329, 331 (BIA 1982)(the lawful permanent resident status of an alien is terminated as a result of his commission of an excludable act or the occurrence of an excludable act event only upon the entry of a final administrative order of exclusion or deportation). *Cf. Garcia-Hernandez v. INS*, 821 F.2d at 224; *Dabone v. Karn*, 763 F.2d at 598 (accrual of the 7 years in an exclusion proceeding stops at least when the decision is administratively final; distinguishing *Wall v. INS*, 722 F.2d 1442, because it was a deportation case in which there was an automatic stay and appellate review available as a

matter of law, both of which are unavailable in exclusion proceedings; unnecessary to decide between positions because alien did not have 7 years of lawful domicile under either view).

The Fifth and Seventh Circuits found that the BIA, in its decision in *Matter of Lok*, had carefully considered all of the alternatives and agreed that lawful permanent residence ends when an order of deportability becomes administratively final. The BIA, in *Matter of Lok*, reasoned as follows:

> Authority to adjudicate an alien's deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the Board. Where an administrative appeal has been taken, the alien is entitled to seek review of an adverse decision of the Board in the United States Circuit Courts of Appeals pursuant to the provisions of section 106 of the Act, 8 U.S.C. 1105a. However, in contrast to the Board's *de novo* review powers, the appellate courts' scope of review is limited. Assuming no error of law or unfairness in procedure, the court must affirm the administrative order of deportation if the order is supported by reasonable, substantial and probative evidence. Section 106(a)(4) of the Act, 8 U.S.C. § 1105a(a)(4).
>
> To hold that an alien under a final administrative order of deportation remains a lawful permanent resident throughout the judicial proceedings would encourage spurious appeals to the courts, made solely for the purpose of accumulating more time toward eligibility

> for section 212(c) relief. The termination of lawful permanent resident status upon the entry of a final administrative order of deportation, on the other hand, would result in no ultimate prejudice to the alien. In those relatively rare instances where the court determines that the Board erred, as a matter of fact or law, with respect to its deportability finding, reversal of the Board's order of deportation nullifies the order and restores the alien's lawful permanent resident status.

Matter of Lok, 18 I&N Dec. at 107.

The Fifth and Seventh Circuits agreed that the BIA's interpretation is sensible because it allows the alien ample time to assert his claim for §212(c) relief but prevents him from stringing out his claims and delaying the ultimate disposition of the case. *Variamparambil v. INS*, 831 F.2d at 1367; *Garcia-Hernandez v. INS*, 821 F.2d at 224; *Rivera v. INS*, 810 F.2d at 541-42.

3. Second and Ninth Circuit Position

The Second Circuit has held that if the alien concedes deportability and no appeal is taken challenging the finding of deportability within the 10-day regulatory period, the order of deportability becomes final. 8 C.F.R. §§242.21, 243.1. *Tim Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982). The Second Circuit, in *Tim Lok v. INS*, 681 F.2d at 110 ruled:

> The order of deportability probably became final under the pertinent regulations 10 days [after Lok conceded deportability and the judge found him deportable] when no appeal was taken

> challenging the finding of deportability. . . . The possibility of [§212(c)] discretionary relief led the INS and the Courts to tolerate Lok's presence; it did not legalize his intent to remain . . . Once Lok's order for deportation was not timely challenged on the merits, he resided in the United States once again as a matter of grace, not law.

The Ninth Circuit felt it was not necessary in *Avila-Murrieta*, 762 F.2d 733 (9th Cir. 1985), to choose between the Eleventh Circuit's ruling in *Marti-Xiques* and the Second Circuit's ruling in *Lok*. Under either, Avila-Murrieta had not attained the required 7 years. The Ninth Circuit held:

> At the very least, an alien's lawful domicile for purposes of §212(c) relief terminates when the alien concedes his deportability and fails to challenge the merits of his deportation order. Although subsequently he may raise a challenge on the merits of that order following a denial of discretionary relief under section 212(c), the automatic stay of 8 U.S.C. § 1105a(a)(3), which was the basis of *Wall*'s holding, never comes into play until an appeal is raised. When an alien concedes his deportability or fails to raise a challenge to an order of deportation, he may no longer be said to harbor a "lawful intent" to remain in this country even if the INS fails to take immediate steps to expel him beyond our borders.

Avila-Murrieta v. INS, 762 F.2d at 736.

The final stage at which the status of an alien "lawfully admitted for permanent residence" may be considered to

have changed within the meaning of § 101(a)(20) of the INA is when a United States Court of Appeals acts upon a petition for review of the BIA's order or the time allowed for filing such petition expires. In *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984), the Ninth Circuit held that the period of lawful domicile encompasses the time pending direct review of a deportation order by a court of appeals where the deportation order is challenged on the merits. The *Wall* court reasoned that "direct attacks on deportation orders are readily distinguishable from attacks on denial of discretionary relief not inconsistent with deportation orders." *Id.* at 1444. There is an automatic statutory stay of deportation pending review of deportability by a court of appeals. INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3); *Maldonado-Sandoval v. INS*, 518 F.2d 278, 280 (9th Cir. 1975). Because Wall had challenged the BIA's deportability decision on petition for review to the Ninth Circuit, his continued presence in the United States after the administrative adjudication of deportability was as a matter of law, not grace. *Wall v. INS*, 722 F.2d at 1444.

Consistent with the holdings in the above-cited line of cases, Ballbe is clearly eligible for §212(c) relief. It is not necessary to decide whether Ballbe's eligibility was cut off by the BIA's decision or whether it continued until the Circuit Court rendered its decision. Ballbe obtained his lawful permanent residence on May 12, 1977. Ballbe conceded to deportability on June 24, 1985, and the Immigration Judge found him deportable in his decision of August 28, 1986. Therefore, even at the earliest date of June 24, 1985, when deportability was established, Ballbe had accrued over 7 years of lawful domicile in the United States. Under all of the administrative and Circuit Court interpretations save the Eleventh Circuit, Ballbe is eligible to apply for §212(c) discretionary relief from deportation.

II. THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM NOTIONS OF DUE PROCESS IN INTERPRETING WHEN LAWFUL DOMICILE TERMINATES AND ITS VIEW IS SUCH AN ABERRATION FROM THE ACCEPTED INTERPRETATION GIVEN TO §212(C) OF THE INA BY THE AGENCY CHARGED WITH ADMINISTERING THE IMMIGRATION AND NATIONALITY LAWS(INS/BIA) THAT THE SUPREME COURT SHOULD EXERCISE ITS POWER OF SUPERVISION.

Because discretionary relief is remedial, preliminary standards of eligibility should be read generously so as not to "preclude the Attorney General from considering the exercise of his discretionary power to alleviate hardships." *Marti-Xiques v. INS*, 741 F.2d at 353. Yet, the Eleventh Circuit, contrary to its own precept, concludes that an alien's accrual of many years of lawful domicile in the United States terminates at a date earlier than a finding of deportability.

The Eleventh Circuit's determination that the cut-off date for §212(c) eligibility is the date on which the Order to Show Cause is issued is unfair and produces illogical results. It is irrational to suppose that lawful domicile is terminated by the issuance of a document which makes charges on which there has not yet been any pleading, proof, or decision. Specifically, in the instant case, it is incongruous to assert that the period of lawful residence is halted by the issuance of a piece of paper (the Order to Show Cause) that was not followed by any hearing for more than 18 months.

Additionally, fixing the issuance of the Order to Show Cause as the cut-off date leaves the alien's eligibility date up to the vagaries of the administrative process. The INS may fortuitously gain information about the alien's

deportable act immediately, or several years after its occurrence, or possibly only when the alien presents himself before INS to file for naturalization or as a petitioner sponsoring another alien for lawful permanent resident status. Once INS comes to know of the deportable act, the amount of time it takes before it issues an Order to Show Cause is again left to the vagaries of the prosecutorial process and tends to be quite arbitrary. Finally, INS could issue an Order to Show Cause on a whim, alleging charges of deportability before it has obtained "clear, unequivocal and convincing" evidence to sustain those charges. *See Woodby v. INS*, 385 U.S. 276, 277 (1966). The INS could thereby keep the Order to Show Cause on file and not file it with the Immigration Court to commence deportation proceedings until months or years later. This would give INS the unfair advantage of terminating a person's eligibility for remedial relief before having sufficient evidence to prove deportability.

Accordingly, the Supreme Court's supervision over the interpretation of the INA and, in particular, the provision at hand is necessary to avoid the gross unfairness of the Eleventh Circuit's holding that "lawful domicile" terminates well before a deportation hearing is held.

III. THE §212(C) WAIVER IS THE MOST VALUABLE FORM OF REMEDIAL RELIEF FROM DEPORTATION AVAILABLE TO A LAWFUL PERMANENT RESIDENT AND, THEREFORE, A PROVISION OF SUCH IMPORTANCE TO IMMIGRATION AND NATIONALITY LAW DEMANDS UNIFORMITY OF INTERPRETATION AND APPLICATION.

Courts have long recognized deportation as punishment of the most draconian kind, subjecting the alien's to banishment and exile. *Fong Haw Tan v. Phelan*, 333 U.S.

6, 10 (1948); *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975). Indeed, this Court has cautioned that deportation may result in the loss of "all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945)(quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

Section 212(c) is the INA's most important waiver provision. For lawful permanent resident aliens, it can excuse most exclusion grounds, as well as their deportation counterparts under §241(a). *Matter of Wadud*, Int. Dec. 2980 at 6-7 (BIA 1984)(§212(c) available to waive deportation grounds that are substantially equivalent to exclusion grounds enumerated in §212(a), but not other deportation grounds); *Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979). *See Cabasug v. INS*, 837 F.2d 880 (9th Cir. 1988)(§212(c) unavailable to excuse deportation ground for conviction of carrying a sawed-off shotgun because no exclusion counterpart). In addition, because judicial and administrative decisions have established on constitutional grounds that §212(c) relief is available in deportation proceedings, it has become a major form of relief from deportation. *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)(aliens with like offenses may not be treated disparately because fortuitously in deportation rather than in exclusion proceedings), cited with approval by the BIA in *Matter of Silva*, 16 I&N Dec. 26, 30 (BIA 1976); *see also Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981) (*Francis* rule accepted in Ninth Circuit).

Such an important form of discretionary relief which allows a long-time lawful permanent resident who can establish substantial equities such as community, family and employment ties to the United States, and a demonstrated rehabilitation from the deportable act, to remain in the United States should not be left to the vagaries of where or in which Circuit the individual resides in the United States. The United States Supreme Court may speak with authority to assure the uniform application of federal law among the several circuits. *United States v. R.J. Reynolds*

Tobacco Co., 416 F.Supp. 316 (D.C.N.J. 1976). The Supreme Court has granted certiorari in other cases involving the interpretation of the Immigration and Nationality Act to assure uniformity of decisions of the Courts of Appeals and/or uniformity of decisions between the Courts of Appeals and the agency charged with the administration of the immigration laws. *See generally, Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987) *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *INS v. Errico*, 385 U.S. 214 (1966).

At present, an alien charged with being deportable from the United States pursuant to §241(a)(11) of the INA, 8 U.S.C. § 1251(a)(11), based upon a drug offense in which the alien contests deportability, would be treated differently with regard to his eligibility to seek §212(c) discretionary relief from deportation depending upon where he resides in the United States. Assume that this alien is a lawful permanent resident, that he was admitted as such on June 1, 1981, that an Order to Show Cause was issued on January 1, 1988, that an Immigration Judge found him deportable on May 1, 1988, that the BIA affirmed the finding of deportability on June 1, 1989, and that a Court of Appeals affirmed the alien's deportability upon a petition for review on February 1, 1990, the alien having contested the charge of deportability through the petition for review by a Court of Appeals. If the alien lives in the jurisdiction of the Ninth Circuit, the cut-off date for threshold eligibility for §212(c) relief would be February 1, 1990. If the alien lives in the jurisdiction of the Eleventh Circuit, the cut-off date would be January 1, 1988. In all other areas of the United States (Fifth Circuit, Seventh Circuit and those areas which would follow the BIA interpretation because the issue has not yet been raised at the circuit court level), the cut-off date would be June 1, 1989. As the scenarios change, the interpretations of when "lawful domicile" terminates for purposes of §212(c) relief become even more disparate.

The Supreme Court should give meaning to this statutory provision in light of its humanitarian purpose of preventing loss of lawful permanent resident status of an alien with substantial community, family, and employment ties in the United States and of preventing the break-up of families often composed of United States citizens and lawful permanent residents. The conflict among the circuits must be resolved in favor of the longstanding administrative interpretation that "lawful domicile" may not terminate until there has been a final finding of deportability after a deportation hearing, thereby affording the lawful permanent resident alien the due process guaranteed by the fifth amendment of the Constitution.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

THOMAS A. ELLIOT
(Counsel of Record)
LAW OFFICES OF
THOMAS A. ELLIOT, P.C.
1725 K Street, N.W., Suite 1114
Washington, D.C. 20006
(202) 429-1725

Dated: January 16, 1989

Carlos Alberto BALLBE, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 89-5108

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Oct. 18, 1989.

On Petition to Review Order of the Board of Immigration Appeals.

Before TJOFLAT, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

Petitioner Carlos Alberto Ballbe appeals from the August 3, 1988 Board of Immigration Appeals' decision which dismissed Ballbe's appeal from the immigration judge's ruling that Ballbe is deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11)(1988) and ineligible for a waiver of inadmissibility under section 212(c) of the INA, 8 U.S.C. § 1182(c) (1988). Ballbe argues that the immigration judge erred in computing the seven-year period of "lawful unrelinquished domicile" in the United States required for discretionary relief under section 212(c) of the INA, 8 U.S.C. § 1182(c) (1988). Ballbe further contends that the

immigration judge acted arbitrarily and capriciously in ruling that even if Ballbe was eligible, he would not be entitled to a waiver of inadmissibility. For the reasons set forth below, we AFFIRM the Board of Immigration Appeals' dismissal of appeal from the decision of the immigration judge.

I. BACKGROUND

Carlos Ballbe is a native of Argentina. He has a wife, who is a United States citizen, and four resident and/or citizen children, ranging from twenty-six to twenty-eight years in age. While he resided in Argentina, Ballbe was a lawyer and a judge. On May 12, 1977, when he was 44 years old, Ballbe lawfully entered the United States as a permanent resident. Since establishing his domicile in the United States, Ballbe has owned and operated several businesses involving the importation and exportation of motor vehicles.

On May 18, 1983, a federal grand jury returned an indictment charging Ballbe with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (1986). Ballbe was convicted of this crime on September 19, 1983, and was sentenced to two years incarceration followed by a special parole term of three years. He served seventeen months.

Shortly after Ballbe's conviction, on November 2, 1983, the INS issued an order to show cause charging that Ballbe's conviction subjected him to deportation under section 241(a)(11) of the INA, 8 U.S.C. § 1251(a)(11)(1988). At the time the INS issued the order to show cause, Ballbe was still incarcerated. The INS mailed the order to show cause to Ballbe in care of the Federal Correctional Institution in Ashland, Kentucky. On October 19, 1984, after serving his prison term, Ballbe was released into the custody of the INS. On October 24, 1984, the order to show cause was filed with the office of the

immigration judge.

On May 31, 1985, Ballbe attended a hearing in front of an immigration judge and plead not guilty to the deportation charge. He also challenged the order to show cause on jurisdictional grounds, namely improper service. The immigration judge ruled that Ballbe had adequate notice of the hearing and had adequate time to prepare his case, as Ballbe admitted to becoming aware of the order to show cause in May, 1984, and his hearing on the merits was not until June 17, 1985. The judge found further that Ballbe appeared in court with a copy of the order to show cause in hand. The BIA upheld the immigration judge's ruling.

Additionally, in the June 17, 1985 hearing, Ballbe challenged an allegation in the order to show cause which stated that Ballbe's most recent date of entry into the United States was January 8, 1983. After evidence was presented indicating that [the] Ballbe's last date of entry was February 1, 1983, the INS moved to make a pen and ink amendment to the order to show cause. The immigration judge denied the motion, but ruled that the INS could make a formal amendment. The amended order to show cause was issued on June 17, 1985 and contained the same allegations as the original order to show cause except for the most recent date of entry. Additionally, on June 17, 1985, Ballbe filed an application for a section 212(c) discretionary waiver of inadmissibility.

The hearing resumed on July 24, 1985, and Ballbe argued that the amended order to show cause should supersede the original order to show cause so that the section 212(c) seven-year period could be calculated from the date of the amended order to show cause. At the hearing the immigration judge ruled that the "amended order to show cause is the order to show cause that must be established for purposes of deportation and all other purposes." (R. 1-119). Shortly after this ruling, Ballbe

conceded deportability under section 241(a)(11) of the INA, 8 U.S.C. § 1251(a)(11) (1988), and relied exclusively on the section 212(c) waiver of inadmissibility to provide him an opportunity to remain in the United States. The immigration judge permitted both parties to present evidence regarding the section 212(c) claim for discretionary relief.

The judge's final decision stated that for purposes of section 212(c) relief, the date of issuance of the original order to show cause would control. The judge reasoned that because 8 C.F.R. § 242.16(d) (1987), and the case law arising from it, provides for amendments of both the charges and the factual allegations in an order to show cause, the amendment here did not change the issuance date for purposes of calculating the requisite seven-year period. Further, the judge found that the amendment in this instance was hypertechnical and had no effect on the proceedings. The judge therefore held that Ballbe was not eligible for a waiver of inadmissibility because the original order to show cause was issued before Ballbe had maintained a lawful unrelinquished domicile in the United States for seven years.

Ballbe appealed the immigration judge's decision to the BIA, and the BIA dismissed the appeal. The BIA used much the same reasoning as the immigration judge to find that Ballbe had not fulfilled the seven-year requirement for section 212(c) discretionary relief. The BIA further held that even if Ballbe was eligible for a waiver of inadmissibility, it would deny such relief in its discretion. The BIA noted that while the evidence established strong equities in favor of Ballbe, the evidence further revealed that an exercise of discretion would not be warranted.

II. DISCUSSION

Ballbe urges us to overturn the BIA's decision on several grounds. First, Ballbe argues that because the INS failed

to properly serve Ballbe with the order to show cause issued on November 2, 1983, we must use the date of issuance of the amended order to show cause (June 17, 1985), which was properly served, for purposes of determining his eligibility for section 212(c) relief. Second, Ballbe contends that the amended order to show cause superseded the original order to show cause, and therefore we must look to the date of the amended order to show cause in calculating the requisite seven-year period. Third, Ballbe asserts that because our decision in *Marti-Xiques v. Immigration & Naturalization Service*, 741 F.2d 350 (11th Cir. 1984), was rendered after the INS issued the original order to show cause in this case, it should not be applied to Ballbe. Finally, Ballbe urges us to reconsider and re-evaluate the ruling in *Marti-Xiques*, to the extent that it directs us to utilize the date of issuance of the order to show cause in determining a deportable alien's eligibility for section 212(c) relief.

A. SERVICE OF THE ORIGINAL ORDER TO SHOW CAUSE

[1] Ballbe asserts that pursuant to this court's holding in *Marti-Xiques*, in order for the seven-year period to toll, deportation proceedings must "commence" within the meaning of 8 C.F.R. § 242.1(a) (1987). In 1983, 8 C.F.R. § 242.1(a) required both issuance and service of the order to show cause for commencement of deportation proceedings. Ballbe contends that since the November 2, 1983 order to show cause was issued but not properly served, Ballbe's deportation proceedings never commenced. Hence, Ballbe argues that the June 17, 1985 order to show cause, which was issued and served, commenced the proceedings and should provide the cutoff date for his eligibility for a discretionary waiver of inadmissibility.

Ballbe's argument fails insofar as Ballbe mistakenly interprets the *Marti-Xiques* decision to state that we must use the date of commencement of the deportation

proceedings, as contemplated by 8 C.F.R. § 242.1(a), rather than the date of issuance of the order to show cause. Although the court stated that "the most viable and fair cutoff date is the date upon which the INS commences the deportation proceedings, *i.e.* when the order to show cause is issued," the court reasoned that "fixing the cutoff date as of the time of the issuance of the show cause order ... avoids the problem of tying the accrual of § 212(c)'s seven-year period to the quirks and delays of the administrative and judicial processes." 741 F.2d at 355. The court then concluded that the date for determining an alien's eligibility for discretionary relief is the date on which the order to show cause is issued. If we infer that the *Marti-Xiques* panel intended the cutoff date to be the date of both issuance and service, we would be ignoring its admonition to sever the cutoff date from the procedural quirks of the judicial system. We believe that in most instances the date of issuance will be most certain, as it appears plainly on the face of the order to show cause. Furthermore, if we were to adopt Ballbe's interpretation of *Marti-Xiques*, we would be faced with another problem--whether to use the date of issuance or the date of service as the seven-year cutoff date. In order to avoid entangling the cutoff date with judicial processed, and concomitantly to avoid jeopardizing the certainty of such date, we hold, as we did in *Marti-Xiques*, that the date to be used in determining whether an alien has maintained a lawful unrelinquished domicile for purposes of determining the alien's eligibility for section 212(c) relief is the date of issuance of the order to show cause.

B. SUBSTITUTION OF THE AMENDED ORDER FOR THE ORIGINAL ORDER

[2] Ballbe contends that even if we find that service of the original order was proper or unnecessary, the INS terminated proceedings under the original order and reinitiated them under the amended order, therefore establishing a new cutoff date for purposes of § 212(c)

relief. Ballbe argues that the amendment regarding his last date of entry into the United States advanced the cutoff date from November 2, 1983 to June 17, 1985.

We agree with the immigration judge and the BIA that the amendment of the factual allegation regarding Ballbe's last date of entry into the United States did not terminate the proceeding under the original order to show cause. 8 C.F.R. § 242.16(d) (1987) provides in pertinent part:

> The Service may at any time during a hearing lodge additional charges of deportability, including factual allegations, against the respondent.

This section allows the INS to amend its factual allegations to conform to the evidence presented at the deportation hearing. *See Forstner v. Immigration & Naturalization Service*, 579 F.2d 506, 508 (9th Cir. 1978), *cert. denied*, 439 U.S. 1071, 99 S.Ct. 841, 59 L.Ed.2d 36 (1979); *Yam Sang Kwai v. Immigration & Naturalization Service*, 411 F.2d 683, 687-688 (D.C.Cir.), *cert. denied*, 396 U.S. 877, 90 S.Ct. 148, 24 L.Ed.2d 135 (1969); *Rassano v. Immigration & Naturalization Service*, 377 F.2d 971 (7th Cir. 1966). Nevertheless, Ballbe argues that while the INS was free to amend the order to show cause during the deportation hearing, it risked extending the section 212(c) cutoff date.

We do not accept Ballbe's position. In this case, the amendment was immaterial to the charge of deportability. The immigration judge found that even if Ballbe's last entry into the United States was on January 8, 1983, as originally alleged, he could have been deported. Additionally, Ballbe never complained that he lacked knowledge of the substantive charges of deportability against him. Ballbe's only contention regarding the charges of deportability was that the allegations in the order to show cause inaccurately reflected his last date of entry into the United States. Ballbe certainly should have known better than anyone else

when he last entered the United States. Thus, when the INS amended the order to show cause, Ballbe should not have been surprised or prejudiced by the new information. Hence, Ballbe can not now assert that the date of issuance of the original order to show cause has been superseded by the date of issuance of the amended order to show cause based upon an amendment immaterial to the substantive charges of deportability, and an amendment the substance of which Ballbe knew beforehand. *See Yam Sang Kwai*, 411 F.2d at 687-688. Further, to allow an extension of the cutoff date every time an amendment is made would contradict our concern for certainty in determining eligibility for a section 212(c) discretionary waiver of inadmissibility. *See Marti-Xiques*, 741 F.2d at 355.

C. APPLICATION OF *MARTI-XIQUES*

[3] Ballbe urges that since *Marti-Xiques* was decided after the INS issued the November 2, 1983, order to show cause, the holding should not be applied to this case. Generally, "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). However, in deciding whether to apply a judicial decision retroactively, the Supreme Court has usually considered three factors: whether the decision to be applied nonretroactively establishes a new principle of law, either by overruling precedent or deciding an issue of first impression; whether the retrospective operation will retard or further the rule in question based upon the merits of each case; and whether the retrospective application will produce substantial inequitable results. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971).

After consideration of these factors, we find that the BIA did not err in applying *Marti-Xiques* to the instant case.

The *Marti-Xiques* decision did not overrule any clear existing precedent within this circuit regarding the cutoff date for section 212(c) relief. In fact, the court recognized that a number of viable alternatives for determining the cutoff date existed. *Marti-Xiques*, 741 F.2d 352-355. Had clear precedent been established when the panel rendered the *Marti-Xiques* decision, the panel would have been found to apply it. *Bonner v. City of Pritchard*, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Moreover, applying *Marti-Xiques* to this case will not result in substantial inequities to Ballbe. The record establishes that Ballbe was fully prepared to argue for discretionary relief at his hearing. He admitted to learning of the order to show cause over a year before his deportation hearing. Further, the immigration judge allowed Ballbe to present a substantial amount of evidence to establish his entitlement to discretionary relief. Additionally, Ballbe can not legitimately argue that his reliance on prior case law caused him to abandon his efforts in establishing his eligibility for section 212(c) relief. Nothing in the record indicates that Ballbe, in reliance on existing precedent, took measures to relinquish his United States domicile after his lawful entrance in 1977. Rather, the record indicates that throughout his hearing, Ballbe was concerned about, and prepared to contest, the application of *Marti-Xiques* to his case. Since Ballbe did not detrimentally alter his position or forego any available opportunities in reliance on case law existing on or before November 2, 1983, application of *Marti-Xiques* will not administer him substantial inequities.

Finally, applying the rule promulgated in *Marti-Xiques* to the instant case will further its purposes. The policy behind establishing the date of issuance of the order to show cause as the terminal date of the requisite seven-year period is to make eligibility for discretionary relief readily ascertainable. 741 F.2d at 355. If we do not apply the rule to this case, we will call into question the relevant cutoff

date to be applied in all cases in which an order to show cause was issued prior to the release of the *Marti-Xiques* decision, and consequently retard the effect of the rule.

D. RECONSIDERATION OF *MARTI-XIQUES*

[4] The Eleventh Circuit has held that no prior decision of the circuit will be overruled unless it is overruled by the court sitting en banc. *Bonner v. City of Pritchard*, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Therefore, we have no power to reconsider our holding in *Marti-Xiques*. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1449 n. 3 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889, 107 S.Ct. 289, 93 L.Ed.2d 263 (1986).

III. CONCLUSION

[5] Following *Marti-Xiques*, we hold that Ballbe's claim for discretionary relief under section 212(c) of the I.N.A., 8 U.S.C. § 1182(c) (1988) is barred because Ballbe failed to show that he had maintained lawful unrelinquished domicile in the United States for seven years prior to issuance of the order to show cause. Since Ballbe is ineligible for discretionary relief, we need not consider the merits of his claim. Accordingly, we AFFIRM the Board of Immigration Appeals' decision to dismiss Ballbe's appeal from the decision of the immigration judge.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5108
Non-Argument Calendar

INS No. A35-927 360

CARLOS ALBERTO BALLBE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service [sic]*

Before TJOFLAT, Chief Judge, FAY, Circuit Judge, and HILL, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the petition of Carlos Ballbe for review of an order of the Immigration and Naturalization Service, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

*Error by Court. Should read "Board of Immigration Appeals."

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that upon the petition for review, the order of the Immigration and Naturalization Service in this cause be, and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 18, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: NOV 13 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5108

CARLOS ALBERTO BALLBE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Florida [sic]*

- - - - - - - - - - - - - - - -

Before TJOFLAT, Chief Judge, FAY, Circuit Judge and HILL, Senior Circuit Judge.

BY THE COURT:

The petitioner's motion for remand is DENIED.

*Error by Court. Should read "Petition for Review of an Order of the INS."

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5108

CARLOS ALBERTO BALLBE,

Petitioner-Appellant,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent-Appellee.

- - - - - - - - - - - - - - - - -

ON SUGGESTION FOR HEARING IN BANC

- - - - - - - - - - - - - - - - -

Before TJOFLAT, HILL and FAY, Circuit Judges.

No Judge in regular active service on the Court having requested that the Court be polled on hearing in banc (Rule 35 Federal Rules of Appellate Procedure; Local 11th Circuit Rule 26) the Suggestion for Hearing In Banc is DENIED.

ENTERED FOR THE COURT;

/s/
UNITED STATES CIRCUIT JUDGE

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A35 927 360 - Miami Date: AUG 3 1988

In re: CARLOS ALBERTO BALLBE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Charles Gordon, Esquire
931 Investment Building
1511 K Street, N.W.
Washington, D.C. 20005

ON BEHALF OF SERVICE: John Frenkel
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act
[8 U.S.C. § 1251(a)(11)] -
Convicted of a controlled substance
(cocaine) violation

ORAL ARGUMENT: April 28, 1988

APPLICATION: Waiver of inadmissibility 212(c)

In a decision dated August 28, 1986, the immigration judge found the respondent deportable as charged, denied his application for waiver of inadmissibility under section

212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordered him deported from the United States. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 55-year-old native and citizen of Argentina, who entered the United States as a lawful permanent resident on May 12, 1977. He has made several departures from the United States, and last entered the United States on February 1, 1983. The respondent's wife is a United States citizen. The[y] have four United States citizen children ages, 28, 26, and two are 27 years old.

The record reveals that the respondent was convicted on September 19, 1983, in the United States District Court of the Southern District of Florida of possession with intent to distribute cocaine. He was sentenced to 2 years incarceration, followed by a special parole term of 3 years; he served 17 months in jail. An Order to Show Cause was issued on November 2, 1983, charging the respondent with deportability under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11). The respondent challenged the proper service of the Order to Show Cause stating that the warden of the prison was served, but he was not served; the respondent, however admits that he became aware of the Order to Show Cause in May 1984. The respondent's deportation hearing commenced on May 31, 1985. An amended Order to Show Cause was issued on June 17, 1985, to correct an error as to the respondent's entry date; the amended Order to Show Cause contained the same information and charge of deportability as the November 1983 Order to Show Cause, the only difference was a change in the date of entry to reflect the respondent's last entry in February 1983.

The immigration judge found the respondent deportable of the charge alleged in the Order to Show Cause, and denied the respondent's request for a waiver of inadmissibility under 212(c) of the Act, on the basis that

the respondent was ineligible for such relief. The immigration judge noted that section 212(c) provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to specified grounds of exclusion enumerated in section 212(a) of the Act. The immigration judge further noted that the Court of Appeals for the Eleventh Circuit, the circuit in which this case arises, has held in Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984), that the period of lawful residence for eligibility for section 212(c) relief is determined as of the date the Order to Show Cause is issued. The immigration judge reasoned that since the respondent entered in May 1977, and the Order to Show Cause was issued on November 2, 1983, he failed to meet the 7 year requirement for section 212(c) relief, and was therefore ineligible for said relief.

The respondent argues on appeal that the immigration judge erroneously concluded that the requisite period of lawful residence ended with the issuance of the Order to Show Cause, that the respondent had completed the necessary 7 year period, and that the grant of section 212(c) relief is warranted in this case. The respondent criticizes the Marti-Xiques standard and argues that the Board should adhere to its principle as set forth in Matter of Lok, 18 I&N Dec. 101 (BIA 1981). In Matter of Lok, supra, the Board concluded that an alien's lawful residence terminates for purposes of section 212(c), with the entry of a final administrative order of deportation, i.e., when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when the appeal is waived or the time allotted for appeal has expired. Using the Lok standard, the respondent argues that insofar as there has been no final disposition of the case, the respondent's lawful residence has not terminated and that he is eligible for 212(c) relief.

As this case arises within the jurisdiction of the Eleventh Circuit, the law of that Circuit controls. We have held that the Board must follow the circuit precedent unless the position taken by that circuit has been expressly disapproved by the Attorney General, and the Solicitor General has challenged the Court's position in a petition for certiorari filed in the Supreme Court. See Matter of Bowe, 17 I&N Dec. 488 (BIA 1980). To be eligible for Section 212(c) relief under the Eleventh Circuit standard, an alien must establish lawful unrelinquished domicile of 7 consecutive years as of the date the Order to Show Cause is issued. See Marti-Xiques v. INS, supra. In this case the Order to Show Cause was issued on November 2, 1983; the respondent entered the United States on May 12, 1977. The respondent did not meet the 7 year requirement and therefore is not eligible for section 212(c) relief.

The respondent further argues that even using the Marti-Xiques standard, he is eligible for section 212(c) relief. The respondent contends that the November 1983 Order to Show Cause was not properly served and contained erroneous entry information. He states that an amended Order to Show Cause was issued on June 17, 1986, and argues that insofar as this amended Order to Show Cause was the basis for the deportation proceeding, its date of issuance in 1986 was the terminal point for lawful residence under Marti-Xiques. The respondent concludes that the amended Order to Show Cause was issued more than 7 years after the respondent's 1977 entry, therefore he is eligible for 212(c) relief under Marti-Xiques. The immigration judge rejected the respondent's reasoning and we concur.

The respondent contends that the warden of the prison was served with the 1983 Order to Show Cause, but he himself failed to receive personal service. He admits that he did become aware of the Order to Show Cause, however, in May 1984. The purpose of personal service of an Order to Show Cause is to give adequate notice of the

hearing. See 8 C.F.R. § 103.5a. The respondent's deportation hearing was held on June 17, 1985; the respondent appeared at said hearing with a copy of the 1983 Order to Show Cause. There is no evidence that the respondent failed to receive adequate notice of the hearing.

With regard to the respondent's argument that the amended Order to Show Cause changes the issuance date of the original Order to Show Cause, this contention is likewise without merit. The 1985 amended Order to Show Cause contains the same charge and information as the 1983 Order to Show Cause, the only difference is a correction in the date of entry. The regulations provide that the Service may at any time during a hearing lodge additional charges of deportability, including factual allegations, against the respondent. See 8 C.F.R. § 242.16(d). The amended 1985 Order to Show Cause reflects only a technical change as to the respondent's entry date. The respondent could have been deported under the original Order to Show Cause, and the amendment to the 1983 Order to Show Cause does not terminate the original Order to Show Cause. We note that in Matter of S-, 7 I&N Dec. 443 (BIA 1957), where there was a defective Order to Show Cause, the Board held that the proper remedy was to remand the case so the appropriate charges could be lodged, not to terminate the Order to Show Cause. See also Matter of Payan, 14 I&N Dec. 58 (BIA 1972); Matter of Yan, 12 I&N Dec. 676 (BIA 1968). The original issuance date of the Order to Show Cause was November 2, 1983, applying the Eleventh Circuit standards, the respondent is not eligible for 212(c) relief for he fails to meet the 7 years lawful unrelinquished domicile requirement.

In addition, we would deny the respondent section 212(c) relief in the exercise of discretion. In Matter of Marin, 16 I&N Dec. 581 (BIA 1978), we stated that certain factors should be considered in determining whether a favorable exercise of discretion is warranted on a waiver request

under section 212(c). Among the factors deemed adverse to an application are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country.

Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to the respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

The equities that an applicant for section 212(c) relief must present to establish that favorable discretionary action is warranted will depend in each case on the nature and circumstances of the ground of exclusion to be waived and on the presence of any additional adverse matters. As the negative factors grow more serious, it becomes incumbent on the respondent to introduce additional offsetting favorable evidence, which in some cases may necessarily involve unusual or outstanding equities. Such a showing at times may be returned solely by virtue of the circumstances and nature of the exclusion ground sought waived.

We recently stated in Matter of Buscemi, Interim Decision 3058 (BIA 1988), that an alien who demonstrates unusual or outstanding equities merely satisfies the threshold test for a favorable exercise of discretion, such a

showing does not compel that discretion be exercised in his favor.

In this case the respondent has outstanding equities in his favor such as his United States citizen wife and children and his close ties with his family. He also has a history of gainful employment, a significant educational background, and residence in the United States since 1977. We note, however, that the respondent was 44 years old when he entered the United States, had already been educated, and had established a career in Argentina. Even considering the extent of the respondent's equities, we do not find that he has demonstrated that he warrants a favorable exercise of discretion. The respondent's drug conviction presents a serious ground of excludability which casts grave doubt upon his desirability as a permanent resident. The respondent was convicted of possession with intent to distribute 8 kilograms of cocaine; this is a significant amount of illegal drugs. The respondent argues that he should be treated with leniency because his offense was motivated by economic considerations only, he is not a drug user, and he had no proprietary interest in the cocaine, rather, he was "simply a courier." The respondent also points out that he has a good background, that he was a lawyer and judge in Argentina, and that he has already exhibited his rehabilitation. Rather than factors in his favor, we conclude that considering the respondent's background, especially the fact that he was a lawyer and judge in Argentina, the respondent should have known the seriousness of his offense. Further, the fact that the time resulted from an economical motivation, rather than from drug usage or addiction, is not an ameliorative factor. Moreover, the fact that the respondent regrets his criminal activity, and has shown evidence of rehabilitation in his prison record and through letters of support is not sufficient. We have held that rehabilitation is one of the favorable considerations in the discretionary evaluation with respect to section 212(c) relief; however such evidence of rehabilitation does not guarantee a favorable exercise of

discretion. See Matter of Buscemi, supra.

Balancing the outstanding equities which the respondent has been able to establish in this case, we do not find that granting relief is warranted or is in the best interests of this country. While the respondent's deportation may well involve hardship to himself and unhappiness for his family, the responsibility for this result rests with the respondent alone. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

IN THE MATTER OF:	) September 12, 1986
	)
CARLOS ALBERTO BALLBE	) A35 927 360
	)
RESPONDENT IN DEPORTATION PROCEEDINGS	) DECISION ON MOTION TO RECONSIDER

The respondent has submitted a motion to reconsider his case. He argues that this court decided his case in a manner inconsistent with a finding made by the court during the course of the proceedings. The finding of the court at issue is whether the Service's "amended" Order to Show Cause changed the issuance date of the original Order to Show Cause from November 2, 1983 to June 17, 1985.

During the proceedings, while referring to the Order to Show Cause, the court stated the June 17, 1985 Order to Show Cause would be used "for purposes of deportation and all other purposes". The court is aware that the respondent could interpret the statement as deciding the issuance date of the Order to Show Cause to be June 17, 1985. Whether or not this phrase was intended to determine the issuance date does not change my decision of August 28, 1986. The fact that my findings during the hearing may or may not be in conflict with my decision does not result in my decision being procedurally wrong. The respondent has failed to present any caselaw that would suggest my decision constituted procedural error. See 8 CFR 103.5. To the contrary respondent's motion acknowledges the court's authority to correct its own mistakes. After careful research, I have decided this case in accordance with the only caselaw available on the subject; the respondent has not brought forward any law

that would encourage me to change my position.

Furthermore, I am convinced that during the course of the hearing the respondent had an adequate opportunity to present his views on "the issuance date of the Order to Show Cause" and despite his surprise at my decision, I cannot see that he was prejudiced. The respondent has had a second opportunity, through his motion to reconsider, to argue that the issuance date of November 2, 1983 is incorrect, but the respondent's position continues to be without a legal basis. See 8 CFR 103.5. The respondent is correct in stating that the cited caselaw in my decision refers to changes in the charge and not the allegations. Since these cases represent the only law I found concerning the issuance of the Order to Show Cause and changes therein, I chose to apply them. I find this position to be appropriate because the regulatory basis for changes in the charges is the same as for changes in the allegations. See 8 CFR 242.16(d).

The respondent also argues that amendments are not to be made on Orders to Show Cause. The court takes notice of the fact that the Service regularly amends Orders to Show Cause with other Orders to Show Cause. The respondent has presented no legal argument to show that this practice violates Federal Regulations. See 8 CFR 103.5. Without legal authority to the contrary, this court will consider "content" over "form" and will not allow the respondent to receive relief from deportation he does not deserve because of a procedural technicality.

For the above stated reasons, this motion is denied.

ORDER: The motion to reconsider is denied.

/s/
Neale S. Foster
Immigration Judge

cc: General Attorney and Stephen E. Mander, Esq.

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

IN THE MATTER OF:	)	August 28, 1986
	)	
CARLOS ALBERTO BALLBE	)	A35 927 360
	)	
RESPONDENT IN	)	
DEPORTATION	)	
PROCEEDINGS	)	DECISION

This is a deportation proceeding instituted by the Immigration and Naturalization Service against the above-named respondent pursuant to the authority contained in section 242 of the Immigration and Nationality Act.

Respondent, a male native and citizen of Argentina, last entered the United States at Miami, Florida on or about February 1, 1983. At that time respondent entered the United States as a returning immigrant who entered the United States for the first time as an immigrant on May 12, 1977. An Order to Show Cause regarding respondent was issued on November 2, 1983. The Order to Show Cause was mailed to respondent while he was incarcerated. It is unclear when respondent received notice of the charges against him, but the record reflects that respondent did receive notice while still incarcerated. The Service alleges that respondent is subject to deportation pursuant to Section 241(a)(11) of the Immigration and Nationality Act, in that, respondent was convicted of a conspiracy to violate any law or regulation relating to the illicit traffic in narcotic drugs.

During the course of the proceedings respondent denied the allegations in the Order to Show Cause, but at the hearing, under oath, he admitted he is a citizen of Argentina, that he is not a citizen or national of the United

States, and that he is a lawful permanent resident of the United States. Respondent's passport, which is part of the Record of Proceedings, establishes that he has entered the United States on numerous occasions. This document establishes that he did enter the United States on or about January 8, 1983 and February 1, 1983. The Record of Proceeding also contains a certified Judgment and Probation Commitment Order dated September 19, 1983 reciting that respondent pled guilty to possession with intent to distribute cocaine in violation of 21 U.S.C. 841(a)(1). The same document reflects the fact that respondent was convicted of the above named charge and sentenced by the United States District Court for the Southern District of Florida to two years imprisonment to be followed by a Special Parole Term of three years.

Based on the evidence presented above I find that the Service has established deportability by clear, convincing and unequivocal evidence. I find that respondent is deportable of the charge alleged in the Order to Show Cause.

During the course of the hearing respondent submitted a request for relief from deportation under section 212(c) of the Act. That section provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in section 212(a) of the Act. Relief under 212(c) has been expanded to include those otherwise eligible who have not left the United States for a temporary absence. See Matter of Silva, 16 I&N Dec. 26 (BIA 1976); Matter of Hom, 16 I&N Dec. 112 (BIA 1977). At issue in this case is whether or not respondent satisfies the requirement of a lawful unrelinquished domicile of seven consecutive years.

In Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984), the court held that an alien must meet the "seven consecutive years" requirement prior to the commencement of the deportation proceedings, i.e. before the Order to Show Cause is issued. Respondent was issued the Order to Show Cause on November 2, 1983, before the seven years had run. The respondent challenges the validity of the Order to Show Cause. He argues that the proceedings under the 1983 Order to Show Cause should be terminated and that a new Order to Show Cause was issued in 1985 giving respondent eligibility for relief under section 212(c) of the Act. The Service did, in fact, issue an "amended" Order to Show Cause on June 17, 1985. It was issued for the purpose of correcting the date of respondents entry into the United States under allegation number three.

In respondent's challenge to the validity of the first Order to Show Cause he alleges that at the time the Order to Show Cause was served, respondent was incarcerated. For that reason, the respondent and the warden of the prison should have been served. See 8 C.F.R. 103.5a(c)(2)(i). Respondent claims that only the warden was served and since service was incorrect the Order to Show Cause is invalid.

The respondent's position is not well taken. The purpose of service is to give adequate notice of the hearing so that respondent will not be denied due process. If service was improper, respondent's remedy is good service and not the cancellation of the Order to Show Cause. In this case, respondent has received his remedy in that he received adequate notice and has had adequate time to prepare his case. Respondent specifically admits that he became aware of the Order to Show Cause in May of 1984. His hearing on the merits was not until June 17, 1985. Furthermore, Respondent appeared in court and submitted to the jurisdiction of the court with a copy of the Order to Show Cause in hand. Under these circumstances I find that the original Order to Show Cause gave adequate notice to

the respondent and is still valid.

Respondent also argues that if he had been served in the proper manner and at the proper time he may have been eligible for section 212(c) relief because his case would have been heard before the holding in Marti-Xiques v. INS, supra. In the same vein, he argues that he was denied a speedy trial. He states that in 1984, prior to the holding of Marti-Xiques, he requested a speedy trial from the Immigration Service and the request was denied.

In response to this argument I will first point out that no request for a speedy trial was ever made to the court. Upon presentation of the Order to Show Cause to the court a hearing was timely scheduled. For this reason, the court finds no fault in the timetable of this proceeding. As a matter of fact, respondent did not even raise this issue until his fifth appearance before the court, at that point his complaint about a speedy trial is an eleventh hour complaint and moot.

Furthermore, the respondent has not shown affirmative misconduct on the part of the Service in order to claim equitable estoppel, assuming equitable estoppel even exists in Immigration proceedings. See, e.g., INS v. Miranda, 103 S.Ct. 281 (1982); Jaa v. INS, 779 F.2d 569 (9th Cir. 1986); Matter of Tuakoi, Int. Dec. #3004 (BIA 1985). Along the same lines, the courts and Board have held that delays in proceedings are not normally actionable as affirmative misconduct. See, e.g., INS v. Miranda, supra; Matter of Onal, 18 I&N Dec. 147 (BIA 1981, 1983).

Finally, I would point out that the Service does not normally present the Order to Show Cause to the court when an alien is incarcerated. Under section 242(h) of the Act an alien cannot be deported until after his period of incarceration is complete. Also, after release, the alien is more accessible to the court. The Service was following its usual procedure by requesting a hearing after the alien was

released from incarceration. This is relevant because the question of promptness is affected by the circumstances of the case. There was no reason to give respondent a hearing until after his release of October 19, 1984, which was also after the September, 1984, ruling in Marti-Xiques.

Respondents also argues that the 1985 amendment to the Order to Show Cause changes the issuance date. The amendment came about because during the course of the proceedings, respondent challenged allegation number three. The original allegation stated that respondent entered the United States at Miami, Florida on or about January 8, 1983. The allegation was correct, but it did not reflect respondent's last entry into the United States. On form I-221S, the Service issued an amended Order to Show Cause so that the Order to Show Cause would reflect the last entry date. This Order to Show Cause was issued and served June 17, 1985. The second I-221S states on the top left hand corner that it is an "amended" Order to Show Cause. This amended form contains the exact same information as the original Order to Show Cause, but allegation number three states that respondent entered the United States on or about February 1, 1983, instead of January 8, 1983. Respondent argues that the error in the Order to Show Cause and the amended Order to Show Cause result in a new issuance date of June 17, 1985. He argues that since the Order to Show Cause was issued in 1985, respondent is eligible to section 212(c) relief.

I cannot agree with respondent. Under 8 C.F.R. 242.16(d), the Service can lodge both charges and allegations after the issuance of an Order to Show Cause. As early as 1953 the courts began recognizing the authority of the Service to alter the Order to Show Cause. See Haymes v. Landon, 115 F. Supp. 506 (S.D. Cal. 1953). More recently the 2nd Circuit and the Board of Immigration Appeals noted that "[t]he order to show cause merely enables the Immigration Service to obtain direct jurisdiction over the person of the alien. It sets in motion

an inquiry which may follow broad lines, possibly eliminating the presently alleged grounds for deportation and substituting others." See Hoh Yeh Sze v. INS, 389 F.2d 978, 981 (2nd Cir. 1968); Matter of Payan, 14 I&N Dec. 58 (BIA 1972). In Matter of S--, 7 I&N Dec. 443 (BIA 1957), the Board granted specific permission to amend defective charges. In that case the Board did not terminate proceedings and begin again under a new Order to Show Cause, but simply reopened the case. The Board specifically stated "inasmuch as the defects are technical and do not relate to the merits of the charge, we will reopen the hearing in order that such charges as are appropriate may be lodged in accordance with the regulations." See Id. Under the holdings of these cases I find that the amendment did not change the issuance date. The commencement of proceedings occurred when the Service took jurisdiction under an Order to Show Cause. This is the event that the 11th Circuit decided controls. In respondent's case this occurred on November 2, 1983.

In further support of this position, I must consider the fact that the change in the Order to Show Cause had no effect on the proceedings. See Id. The change was less than technical; the Order to Show Cause was correct before the change and the respondent could have been deported under the allegations in that document. Respondent did enter the United States as alleged and the date of entry was not a factor in determining deportability.

For the reasons stated above, I find that respondent is ineligible for relief from deportation under section 212(c) of the Act. Because he is ineligible, I will not decide the merits of his 212(c) request. I find that respondent is deportable and has no available remedies. I will order him deported. Respondent has requested that he be deported to West Germany if deportation should be required.

ORDER: It is ordered that respondent's request for a waiver under section 212(c) of the Act be denied.

IT SHALL BE FURTHER ORDERED: that respondent be deported from the United States to West Germany on the charge stated in the Order to Show Cause.

IT SHALL BE FURTHER ORDERED that if West Germany advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months of the inquiry by the Attorney General as to whether or not they will accept the respondent, the respondent will be deported to Argentina.

/s/
Neale S. Foster
Immigration Judge

FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1111

In the Supreme Court of the United States

OCTOBER TERM, 1989

CARLOS ALBERTO BALLBE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
LAURI STEVEN FILPPU
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner, who had not acquired "lawful unrelinquished domicile of seven consecutive years" when the Immigration and Naturalization Service issued a show cause order to begin proceedings to deport him for narcotics trafficking, is eligible for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Avila-Murrieta v. *INS*, 762 F.2d 733 (9th Cir. 1985)	14, 16
Blackwood v. *INS*, 803 F.2d 1165 (11th Cir. 1986)	21
Cabasug v. *INS*, 847 F.2d 1321 (9th Cir. 1988)	18, 19
Cardoza-Fonseca v. *INS*, 767 F.2d 1448 (9th Cir. 1985), aff'd, 480 U.S. 421 (1987)	21
Couch v. *United States*, 409 U.S. 322 (1973)	22
Dabone v. *Karn*, 763 F.2d 593 (3d Cir. 1985)	14
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	6-7, 16
Garcia-Hernandez v. *INS*, 821 F.2d 222 (5th Cir. 1987)	14
Lok v. *INS*, 681 F.2d 107 (2d Cir. 1982)	14, 16
Marti-Xiques v. *INS*, 713 F.2d 1511 (11th Cir. 1983), vacated, 724 F.2d 1463, rev'd on other grounds, 741 F.2d 350 (11th Cir. 1984)	18
Marti-Xiques v. *INS*, 741 F.2d 350 (11th Cir. 1984)	9, 15, 16, 21, 22
Matter of Arias-Uribe, 13 I & N Dec. 696 (BIA 1971), aff'd, *Arias-Uribe* v. *INS*, 466 F.2d 1198 (9th Cir. 1972)	6
Matter of Buscemi, Interim Dec. No. 3058 (BIA 1988)	10
Matter of Duarte, 18 I & N Dec. 329 (BIA 1982)	16
Matter of Edwards, 10 I & N Dec. 506 (BIA 1963, 1964)	6

Cases—Continued: Page

Matter of G—A—, 7 I & N Dec. 274 (BIA 1956) . . 6
Matter of Granados, 16 I & N Dec. 726 (BIA 1979) 18
Matter of Hernandez, No. A17 963 863 (BIA Jan. 11, 1990) 17, 18, 19, 20
Matter of L, 1 I & N Dec. 1 (AG 1940) 5
Matter of Lok, 18 I & N Dec. 101 (BIA 1981) 9-10, 13, 14, 16, 17, 21
Matter of Marin, 16 I & N Dec. 581 (BIA 1978) 10
Matter of S, 6 I & N Dec. 392 (BIA 1954; AG 1955) 5
Matter of Salmon, 16 I & N Dec. 734 (BIA 1978) . . . 18
Matter of Silva, 16 I & N Dec. 26 (BIA 1976) 7
Matter of Smith, 11 I & N Dec. 325 (BIA 1965) 6
Matter of Totolos, No. A-3497579 (BIA July 31, 1985) 15
Navigazone Generale Italiana v. *Elting*, 66 F.2d 537 (2d Cir.), cert. denied, 290 U.S. 691 (1933) . . 16
Patel v. *INS*, 811 F.2d 377 (7th Cir. 1987) 21
Reid v. *INS*, 756 F.2d 7 (3d Cir. 1985) 15
Rivera v. *INS*, 810 F.2d 540 (5th Cir. 1987) 14
Rosenberg v. *Fleuti*, 374 U.S. 449 (1963) 6
Schreiber v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985) 15
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981) . . 7
Tapia-Acuna v. *United States*, 449 U.S. 945 (1980) 7
Transatlantica Italiana v. *Elting*, 74 F.2d 732 (2d Cir. 1935) 16
Ungo v. *Beechie*, 311 F.2d 905 (9th Cir.), cert. denied, 373 U.S. 911 (1963) 16
Variamparambil v. *INS*, 831 F.2d 1362 (7th Cir. 1987) 13, 14, 16, 21
Wall v. *INS*, 722 F.2d 1442 (9th Cir. 1984) 14

Statutes and regulations: Page

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(b), 100 Stat. 3207-47 8-9

Controlled Substances Act, 21 U.S.C. 841(a)(1) ... 8

Immigration Act of 1917, ch. 29, § 3, 39 Stat. 878 .. 4

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

§ 101(a)(20), 8 U.S.C. 1101(a)(20) 13, 14

§ 106, 8 U.S.C. 1105a 11

§ 212, 8 U.S.C. 1182 2

§ 212(a), 8 U.S.C. 1182(a) 2, 3

§ 212(a)(1)-(3), 8 U.S.C. 1182(a)(1)-(3) 4

§ 212(a)(6), 8 U.S.C. 1182(a)(6) 4

§ 212(a)(11), 8 U.S.C. 1182(a)(11) 4

§ 212(a)(23), 8 U.S.C. 1182(a)(23) 20

§ 212(a)(26), 1182(a)(26) 2

§ 212(a)(27)-(29), 8 U.S.C. 1182(a)(27)-(29)... 2

§ 212(a)(33), 8 U.S.C. 1182(a)(33) 4

§ 245, 8 U.S.C. 1255 6

§ 8(a)(32), U.S.C. 1182(a)(32) 2

§ 212(a)(4), 8 U.S.C. 1182(a)(4) 4

§ 212(c), 8 U.S.C. 1182(c) ..... *passim*

§ 241, 8 U.S.C. 1251 3

§ 241(a)(11), 8 U.S.C. 1251(a)(11) 20

§ 241(a)(2), 8 U.S.C. 1251(a)(2) 4, 19

§ 241(a)(3), 8 U.S.C. 1251(a)(3) 4

§ 241(a)(11), 8 U.S.C. 1251(a)(11) (1982) 8

§ 241(a)(14), 8 U.S.C. 1251(a)(14) 4

§ 244, 8 U.S.C. 1254 3

§ 244, 8 U.S.C. 1254(a) 3

§ 245, 8 U.S.C. 1255 6

8 U.S.C. 1551 18

21 U.S.C. 841(a)(1) 8

8 C.F.R.:

Sections 3.1 *et seq.* 18

Section 3.1(h)(1) 19

Miscellaneous: Page

Note, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. Chi. L. Rev. 771 (1980) 4

S. Rep. No. 355, 63d Cong., 2d Sess. (1914) 3

S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 3

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1111

CARLOS ALBERTO BALLBE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 886 F.2d 306. The decision of the Board of Immigration Appeals (Pet. App. 15a-22a), and the decisions of the administrative immigration judge (Pet. App. 23a-31a) are [redacted] unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1989 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case raises the question of petitioner's eligibility for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c). Because examination of this petition for certiorari requires consideration of issues concerning the applicability *vel non* of Section 212(c) in deportation proceedings—issues substantially broader than the particular issue concerning computation of time decided by the court of appeals—a brief overview of the application of Section 212(c) in deportation proceedings is necessary as background to the facts of this case.

1. Section 212 of the INA, 8 U.S.C. 1182, sets forth the categories of aliens who are "ineligible to receive visas and shall be excluded from admission into the United States," 8 U.S.C. 1182(a), as well as the circumstances under which an alien may be admitted despite the fact that he comes within one or more of those categories. Section 212(a), 8 U.S.C. 1182(a), lists in 33 paragraphs the principal categories of excludable aliens. Section 212(c), the provision at issue in this case, provides that aliens who fall within any but a few of those excludable categories[1] may nonetheless be eligible for discretionary admittance into the country:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion

[1] The categories of excludable aliens who are *per se* ineligible for Section 212(c) discretionary admission include undocumented nonimmigrants, 8 U.S.C. 1182(a)(26), Communists, Nazis, and other followers of totalitarian ideologies, 8 U.S.C. 1182(a)(27)-(29) and (33), and certain medical professionals, 8 U.S.C. 1182(a)(32).

> of the Attorney General without regard to the provisions of paragraphs (1) to (25) and paragraphs (30) and (31) of subsection (a) * * *.

The express language of the statute provides that an alien is eligible for discretionary waiver of exclusion under Section 212(c) only if he has been "lawfully admitted for permanent residence," has "temporarily proceeded abroad voluntarily and not under an order of deportation," and is "returning to a lawful unrelinquished domicile of seven consecutive years."[2] Other provisions of Section 212 contain additional exceptions from the excludable categories listed in Section 212(a).

2. In general, the grounds for deportation are set out in Section 241 of the INA, 8 U.S.C. 1251, and the circumstances under which deportation will be suspended despite the existence of those grounds in a particular case are set out, *inter alia*, in Section 244, 8 U.S.C. 1254.[3] Because the

---

[2] See generally S. Rep. No. 355, 63d Cong., 2d Sess. 6 (1914) (discussing purposes of predecessor statute "to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship"); S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950) (discussing changes made when language of what is now Section 212(c) was incorporated in predecessor bill).

[3] Among the broadest such provisions is Section 244(a), which provides that deportable individuals may be eligible for discretionary adjustment of status and suspension of deportation if they meet certain requirements. The primary differences between the requirements of Section 244(a) and Section 212(c) are that (1) Section 244(a) requires that the alien have been "physically present in the United States for a continuous period of not less than" seven or ten years (depending upon the provision under which the alien is subject to deportation) while Section 212(c) requires a "lawful unrelinquished domicile of seven consecutive years," and (2) Section 244(a) requires that the alien show good moral character and hardship resulting from deportation, requirements that have no express counterparts in Section 212(c).

conditions of eligibility for suspension of deportation are in general more stringent than those for waiver of exclusion under Section 212(c), an individual presenting himself for admission to the country may be eligible for discretionary waiver of grounds of exclusion under Section 212(c) even if that same individual inside the United States would not be eligible, under statutory provisions other than Section 212(c), for discretionary suspension of deportation.

Although there is some correspondence between grounds for exclusion and grounds for deportation, the two are by no means identical. For example, an alien may be excluded because he is mentally retarded, insane, or has a mental defect. See 8 U.S.C. 1182(a)(1)-(3). The comparable ground for deporting an alien applies only to those aliens who had such a mental deficiency at the time of entry and also have been hospitalized for the deficiency within five years after entry. 8 U.S.C. 1251(a)(3). Other grounds for exclusion have no counterpart in the deportation provisions. See, *e.g.*, 8 U.S.C. 1182(a)(4) (sexual deviation); 8 U.S.C. 1182(a)(6) (contagious disease); 8 U.S.C. 1182(a)(11) (polygamists). Similarly, some grounds for deportation have no precise counterpart in the exclusion provisions. For example, illegal entry is itself a ground for deportation. See 8 U.S.C. 1251(a)(2). See also 8 U.S.C. 1251(a)(14) (conviction for possessing certain firearms). See generally Note, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. Chi. L. Rev. 771, 772-773 & nn. 9-11 (1980).

3. In a series of decisions under Section 212(c) and its predecessor (the Seventh Proviso to Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 878[4]), the Attorney

[4] The Seventh Proviso specified that, notwithstanding the existence of grounds for exclusion, "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years

General, the Board of Immigration Appeals, the Immigration and Naturalization Service (INS), and the courts have gradually but dramatically expanded the scope of the statute. The first decision applying the Seventh Proviso in deportation proceedings was *Matter of L*, 11& N Dec. 1 (AG 1940). The alien in *Matter of L* had entered the country, committed and been convicted of an excludable offense (larceny), and then traveled abroad. When he returned, he had been readmitted with no mention of his conviction and no application for waiver of this ground of exclusion. The Attorney General ruled that, in these circumstances, the predecessor of Section 212(c) was available to waive the ground of exclusion *nunc pro tunc*, thus rendering the alien's re-entry legal. In addition, although the alien still could have been deported on the ground that he had been convicted of a crime involving moral turpitude prior to his most recent entry into the country and was apparently not eligible for discretionary relief under any other provision, the Attorney General ruled that the retroactive waiver of the ground of exclusion precluded deportation for the corresponding but otherwise nonwaivable ground for deportation.

After Section 212(c) replaced the Seventh Proviso, similar decisions were reached applying Section 212(c) in deportation proceedings in which, as in *Matter of L*, the permanent resident alien had entered the country legally, subsequently committed an excludable offense, and then become deportable because he made a trip abroad and was readmitted with no mention—and no waiver—of the excludable offense. *E.g.*, *Matter of S*, 6 I & N Dec. 392 (BIA 1954; AG 1955) (holding that Congress did not intend to prohibit this practice when it replaced the Seventh Proviso

---

may be admitted in the discretion of the [Attorney General], and under such conditions as he may prescribe."

with Section 212(c)); *Matter of G—A—*, 7 I & N Dec. 274 (BIA 1956) (grant of Section 212(c) waiver precludes deportation on corresponding ground of deportation). *Matter of Edwards*, 10 I & N Dec. 506 (BIA 1963, 1964), went one step further. The alien once again had been admitted as a permanent resident and was then convicted of offenses that rendered him subject to both exclusion and deportation. He subsequently visited Canada for a few hours to attend a funeral. *Id.* at 506. Under *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this brief visit abroad did not lead to "entry" back into the United States, and thus the alien could not have been excluded from the country when he presented himself at the border. Yet, notwithstanding the fact that the alien was never subject to exclusion after having committed the excludable offense, the Board of Immigration Appeals in a later deportation proceeding found him eligible for waiver of deportation under Section 212(c).

Despite this expansive interpretation of Section 212(c), until 1976 the statute was still read to require a departure from the United States, or a statutory "admissibility" condition to eligibility for adjustment of status,[5] in order to trigger the availability of relief in deportation proceedings. See, *e.g.*, *Matter of Arias-Uribe*, 13 I & N Dec. 696 (BIA 1971) (Section 212(c) relief unavailable to an alien who had not departed from the United States and was ineligible for adjustment of status), aff'd, *Arias-Uribe* v. *INS*, 466 F.2d 1198 (9th Cir. 1972). However, in *Francis* v. *INS*, 532

[5] In *Matter of Smith*, 11 I & N Dec. 325 (BIA 1965), the Board ruled that Section 212(c) relief was available in adjustment of status proceedings under Section 245 of the INA, 8 U.S.C. 1255, despite the fact that the alien had made no departure from and re-entry into the United States. The Board based its ruling on the fact that admissibility to the United States is one of the requirements for granting such an adjustment of status.

F.2d 268 (2d Cir. 1976), the Second Circuit held that an alien who had not left the country at all, and who was not seeking to prove his "admissibility" for purposes of a Section 245 adjustment of status proceeding, was eligible for Section 212(c) relief. The court based its holding on its view that the individual subject to deportation in that case was denied eligibility for Section 212(c) relief solely because he had failed to travel abroad, even for a few hours as in *Matter of Edwards*. According to the court, he was thereby "subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." 532 F.2d at 273. The failure to include him within the class covered by Section 212(c), as it had been construed up to that time, was held to be unconstitutional.

The Board of Immigration Appeals subsequently applied the *Francis* rule nationwide, in part because the Solicitor General had determined not to file a petition for certiorari in *Francis* and the INS decided to apply the *Francis* rationale nationwide to permit aliens who had not traveled abroad to apply for Section 212(c) relief. See *Matter of Silva*, 16 I & N Dec. 26, 29-30 (BIA 1976); *id.* at 32-33 (concurring opinion).* As a result of this sequence

* Although the Ninth Circuit at first reaffirmed its previous decision rejecting the *Francis* theory, the Supreme Court remanded the case to the court of appeals for reconsideration in light of the Solicitor General's representation that the government no longer supported the Ninth Circuit rule. *Tapia-Acuna* v. *United States*, 449 U.S. 945 (1980). On remand, the Ninth Circuit followed *Francis*, holding that the distinction between aliens who had traveled abroad and those who had not was irrational, and that consequently "eligibility for § 1182(c) relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251(a)(11), whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability." *Tapia-Acuna* v. *INS*, 640 F.2d 223, 225 (9th Cir. 1981).

of events, the *nunc pro tunc* fiction was abandoned; Section 212(c) became generally available to aliens, whether or not they had left the country after the basis for their deportation had arisen. Although such individuals may never have been subject to exclusion, they could still take advantage of Section 212(c) to obtain what now amounted to a discretionary waiver of deportation.

4. Petitioner is a native and citizen of Argentina, where he lived most of his life and where he became a lawyer and a judge. On May 12, 1977, at age 44, he immigrated to the United States and was admitted as a lawful permanent resident. Pet. App. 2a. He has a United States citizen spouse and four adult children who are either United States citizens or permanent resident aliens. *Ibid.* In September of 1983, he was convicted on his guilty plea of possession with intent to distribute cocaine in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a, 21a. He was sentenced to two years' imprisonment to be followed by a three-year special parole term. *Id.* at 2a.

5. On November 2, 1983, approximately six and one-half years after petitioner's admission to permanent residence, the INS issued an order to show cause alleging that petitioner was deportable under section 241(a)(11) of the INA, 8 U.S.C. 1251(a)(11), by virtue of his cocaine trafficking conviction.[7] Pet. App. 2a. Petitioner was

[7] At the time of petitioner's deportation hearing, Section 241(a)(11), 8 U.S.C. 1251(a)(11) (1982), provided in part for the deportation of any alien "who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs * * * or * * * governing or controlling the * * * transportation, sale, exchange, * * * importation, exportation, or the possession for [such] purpose[s] * * * of * * * coca leaves, * * * [or] any salt derivative or preparation of * * * coca leaves."

This statute was amended, without material change for purposes of this case, by Section 1751(b) of the Anti-Drug Abuse Act of 1986,

served with the show cause order by mail at his place of criminal incarceration (*ibid.*), but asserted that he may not have actually become aware of the show cause order until May 1984. *Id.* at 3a.

Petitioner's deportation hearing commenced in May 1985, after his release from criminal confinement. He denied deportability, but alternatively sought relief from deportation under Section 212(c) and offered extensive evidence in support of that request for relief.

In an order dated August 28, 1986, the immigration judge found petitioner deportable and denied his application for Section 212(c) relief. Pet. App. 25a-31a. The immigration judge concluded that petitioner was not eligible for a Section 212(c) waiver by virtue of the ruling in *Marti-Xiques* v. *INS*, 741 F.2d 350 (11th Cir. 1984). In *Marti-Xiques*, the Eleventh Circuit—the circuit in which the deportation proceeding arose—had ruled that the statutory "seven year lawful unrelinquished domicile" requirement for Section 212(c) relief was measured as of the date of the issuance by the INS of the show cause order. Petitioner had been a domiciliary of the United States for only six and one-half years at the time the show cause order was issued by INS, and thus could not meet the seven year requirement. Pet. App. 26a-27a.

7. Petitioner's administrative appeal was dismissed by the Board of Immigration Appeals on August 3, 1988. Pet. App. 15a-22a. Considering itself bound by Eleventh Circuit precedent, the Board declined petitioner's invitation to follow its own rule, laid down in *Matter of Lok*,

---

Pub. L. No. 99-570, 100 Stat. 3207-47, to provide for the deportation of any alien who "at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802))."

18 I & N Dec. 101 (BIA 1981), to the effect that lawful domicile for Section 212(c) purposes continues until the date of a final administrative finding of deportability. The Board upheld the immigration judge's ruling that petitioner was not eligible for relief, rejecting in the process the additional arguments that the November 1983 show cause order was not properly served, and that the June 1985 date of an amended show cause order ought to control instead. Pet. App. 17a-19a.

Unlike the immigration judge, the Board also turned to the merits of the petitioner's Section 212(c) application and declared that it would in any event deny discretionary relief to petitioner. Pet. App. 19a. In accordance with its established approach to Section 212(c) claims (see *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978); *Matter of Buscemi*, Interim Dec. No. 3058 (BIA 1988)), the Board weighed petitioner's favorable "equities" against his criminal activity. It concluded that petitioner had outstanding favorable equities by virtue of his close family ties to his citizen wife and children, his history of gainful employment, his educational background, and his residence in the United States since 1977. Pet. App. 21a. Weighing against petitioner were the facts that he came to the United States as an adult at age 44 (instead of at a young age), that he had been educated and had established a career in Argentina, that he should have known the seriousness of his offense because of his background as a lawyer and judge, and, most importantly, that he had committed a very serious crime, having been the courier of a significant quantity of illegal drugs. *Ibid.* The Board concluded:

> Balancing the outstanding equities which the [petitioner] had been able to establish in this case, we do not find that granting relief is warranted or is in the best interest of this country. While the [petitioner's]

> deportation may well involve hardship to himself and unhappiness for his family, the responsibility for this result rests with the [petitioner] alone.

Pet. App. 22a.

8. Pursuant to Section 106 of the INA, 8 U.S.C. 1105a, petitioner sought review of the Board's order by the court of appeals. The court of appeals refused to reconsider its *Marti-Xiques* decision and rejected petitioner's arguments respecting the alleged improper service of the 1983 show cause order, the 1985 amendment of the show cause order, and the retroactivity of its *Marti-Xiques* decision. Pet. App. 1a-10a. Relying on *Marti-Xiques*, the court found that petitioner was barred from Section 212(c) relief because he "failed to show that he had maintained lawful unrelinquished domicile in the United States for seven years prior to issuance of the order to show cause." Pet. App. 10a.

ARGUMENT

Petitioner correctly notes that there is a conflict among the circuits respecting the accrual of lawful domicile for Section 212(c) purposes, and that the ruling of the court of appeals in this case is not consistent with the current position of the Board of Immigration Appeals. Moreover, the rule for calculating the period of lawful unrelinquished domicile is a question of importance to permanent resident aliens facing deportation and to the government in the administration of the immigration laws.

Nevertheless, the petition for certiorari should be denied. The conflict in the courts of appeals stems from difficulty in applying Section 212(c)'s language (concerning an alien "returning to a lawful unrelinquished domicile of seven consecutive years") to aliens who are not "returning" to the country at all, but rather are present within the

United States and facing deportation. Although in an ordinary exclusion case the statutory language can be given meaning by calculating the seven year period as of the date the alien "returns" to the country, the statute provides for no comparably straightforward calculation in the deportation context. The difficulties with which the courts of appeals have been struggling are thus a product of the effort to apply a statute originally intended to govern exclusion to individuals who are not, and never have been, subject to exclusion. Any effort by this Court to construe the language of Section 212(c) would likely require consideration of not only the narrow issue of computation of time raised by petitioner, but also the much broader questions whether and under what circumstances Section 212(c) is applicable to petitioner's deportation proceeding at all.

In our view, this is not an opportune time to embark on such a fundamental re-examination of Section 212(c). The question whether Section 212(c) applies in deportation proceedings was not litigated in this case, nor has it recently been litigated before any administrative forum or any court of appeals. This Court would thus not have the benefit of consideration of this underlying issue by administrative authorities and lower courts if review were granted in this case. In addition, at the request of the INS, the Attorney General has recently undertaken a full-scale review of the application *vel non* of Section 212(c) in deportation proceedings. If the Attorney General decides that Section 212(c) has little or no application in deportation proceedings, and if that determination is subsequently upheld by the courts, the present conflict in the circuits as to the computation of time under Section 212(c) in deportation proceedings would lose any continuing significance. Even if the Attorney General does not take this step, the process of review that is now underway with respect to the underlying issue may be of substantial assistance to the

Court when the computation of time issue arises again in another case. Because orderly resolution of the larger issues raised by this case would benefit from permitting the Executive Branch in the first instance to complete its own re-evaluation of the statute, further review of this case is not warranted at this time.

In any event, there is an alternative basis for the result reached by the court of appeals in this case. The Board of Immigration Appeals determined that, even if petitioner were eligible for Section 212(c) relief, he would not merit a favorable exercise of the Attorney General's discretion. Although the court of appeals did not reach this issue, the Board's determination provides a sound independent basis for the result below.

Finally, we submit that if Section 212(c) relief is available to an alien subject to deportation, then the decision of the Eleventh Circuit in this case is correct.

1. Petitioner understandably does not question the extension of Section 212(c) relief to deportation proceedings, but rather attacks the way in which the court of appeals calculated the length of his "lawful unrelinquished domicile." As petitioner notes (Pet. 6), differing positions have been taken by the Board and a number of courts of appeals on this question.

The Board's rule, laid down in *Matter of Lok*, 18 I & N Dec. 101 (BIA 1981), is that the domicile of a permanent resident remains lawful and continues to accrue for Section 212(c) purposes only so long as the alien retains his lawful permanent resident status, and that permanent resident status terminates upon a final administrative finding of deportability. See 8 U.S.C. 1101(a)(20). The Seventh Circuit has upheld this interpretation. See *Variamparambil* v. *INS*, 831 F.2d 1362 (1987).[8] Other circuits have held

[8] Although petitioner asserts (Pet. 11-13) that the Fifth Circuit has also adopted this position, the position of the Fifth Circuit is not en-

or suggested that the cutoff point might occur earlier or later than the point adopted in *Matter of Lok*, depending upon whether the alien challenges the finding of deportability or merely seeks discretionary relief. See *Avila-Murrieta* v. *INS*, 762 F.2d 733, 735 (9th Cir. 1985); *Wall* v. *INS*, 722 F.2d 1442 (9th Cir. 1984); *Lok* v. *INS*, 681 F.2d 107, 110 (2d Cir. 1982).[9]

---

tirely clear. Section 212(c) refers to two requirements that are at least conceptually distinct. First, the alien applying for Section 212(c) relief must be "lawfully admitted for permanent residence." See 8 U.S.C. 1101(a)(20) (definition of terms). Second, the alien must have a "lawful unrelinquished domicile of seven consecutive years." *Variam-parambil* v. *INS*, 831 F.2d 1362, 1365-1366 (7th Cir. 1987). In two decisions, the Fifth Circuit ruled that an alien's "permanent residence" ended at the time the order of deportation becomes administratively final, and that the alien was therefore ineligible to seek Section 212(c) relief from deportation after that time. *Garcia-Hernandez* v. *INS*, 821 F.2d 222 (5th Cir. 1987); *Rivera* v. *INS*, 810 F.2d 540 (5th Cir. 1987). Yet neither of these decisions expressly addressed the question of how to compute seven years of "lawful unrelinquished domicile" or whether the termination of status as "lawfully admitted for permanent residence" occurs at the same time as the termination of "lawful unrelinquished domicile." Therefore, although it may be that the two requirements are related in that "it is illogical to conclude that the domicile of one who retains his lawful permanent resident status could be anything but lawful," *Matter of Lok*, 18 I & Dec. 101, 105 (BIA 1981), it cannot be said that the Fifth Circuit has taken a position as to the proper calculation of "lawful unrelinquished domicile," the precise issue before the Court on this petition.

[9] In *Dabone* v. *Karn*, 763 F.2d 593, 598 (1985), the Third Circuit held that it did not have to choose between the rule that the seven-year period ends when the deportation order becomes administratively final and the Eleventh Circuit rule that the period terminates upon issuance by the INS of a show cause order. By either calculation, the alien in that case would not have been able to show that seven consecutive years of unrelinquished lawful domicile had elapsed. Because the procedurally complex *Dabone* case was an exclusion case, it is not clear in any event that its calculation of time under Section 212(c)

Rejecting the Board's approach, the Eleventh Circuit has adopted a position regarding the accrual of lawful domicile that is not tied to the continuation of the alien's lawful permanent resident status. Instead, it declared in *Marti-Xiques* v. *INS*, 741 F.2d 350 (11th Cir. 1984), that lawful domicile would cease accruing upon the issuance by the INS of an order that the alien show cause why he should not be deported. In the wake of *Marti-Xiques*, the INS has sought to have the Board reconsider its decision in *Matter of Lok* and has argued that the Board should adopt the *Marti-Xiques* rule. The Board, however, has not formally reconsidered *Matter of Lok*.[10]

2. It is a commonplace that statutory interpretation must begin with the terms of the statute itself. *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). The language of Section 212(c) makes discretionary relief from specified grounds of exclusion available to aliens "who temporarily proceeded abroad" and "who are returning to a lawful unrelinquished domicile of seven consecutive years." These terms are in general easily applied in the exclusion setting, at least absent parole into the country or a similar complicating factor. Rather than turning on when the "lawfulness" of a continuing domicile terminates for purposes of Section 212(c), the computation of time can simply be calculated as of the date on which the alien "returns" from a voluntary trip abroad.[11]

---

would have been at odds with any of the cited deportation cases. See also *Reid* v. *INS*, 756 F.2d 7 (3d Cir. 1985) (seven-year period ends at some time before actual deportation from country).

[10] In an unpublished decision, the Board has declined to follow the INS's suggestion that the *Marti-Xiques* rule should be adopted. See *Matter of Totolos*, No. A-3497579 (BIA July 31, 1985).

[11] In decisions predating the *Francis* case, which made Section 212(c) generally applicable in deportation proceedings with no need to show that the alien had made an entry or had other occasion to make

The courts that have reached conflicting decisions as to the computation of time in applying Section 212(c) to waiver of deportation have, of necessity, ignored the statutory terms that limit Section 212(c) to waiver of specified grounds of exclusion, require that the alien have "temporarily proceeded abroad," and require that he be "returning" to the United States. Thus, focussing almost exclusively on the term "lawful," each of those courts has reached its conclusion based on its determination of when in a deportation proceeding the alien's domicile in the United States ceases to be "lawful." See, *e.g.*, *Variamparambil* v. *INS*, 831 F.2d at 1366; *Avila-Murrieta* v. *INS*, 762 F.2d at 734; *Lok* v. *INS*, 681 F.2d at 107; *Marti-Xiques* v. *INS*, 741 F.2d at 352. Similarly, the Board of Immigration Appeals has adopted its rule on the basis of a determination that an alien's status as "lawfully admitted for permanent residence" terminates when an order of deportation becomes administratively final, and that termination of this status in turn terminates the period of

---

an admissibility showing, the courts of appeals had indicated in both deportation and exclusion cases that the computation of time would be calculated as of the date of entry. See *Ungo* v. *Beechie*, 311 F.2d 905, 907 (9th Cir.) ("the period dates back from the entry at which the Secretary is to use his discretion"), cert. denied, 373 U.S. 911 (1963); *Transatlantica Italiana* v. *Elting*, 74 F.2d 732, 733 (2d Cir. 1935) (interpreting Seventh Proviso); *Navigazone Generale Italiana* v. *Elting*, 66 F.2d 537, 540 (2d Cir.) (interpreting Seventh Proviso to require that "domicile must go back seven years from the date of the last arrival"), cert. denied, 290 U.S. 691 (1933). More recently, however, the Board of Immigration Appeals has shown signs of applying its expansive Section 212(c) deportation rulings in the exclusion setting. See, *e.g.*, *Matter of Duarte*, 18 I & N Dec. 329 (BIA 1982) (relying on *Matter of Lok*, *supra*, and *Francis* v. *INS*, *supra*, for the conclusion that an alien does not lose his status as a "lawful permanent resident" until the entry of a final administrative finding of exclusion).

"lawful unrelinquished domicile." *Matter of Lok*, 18 I & N Dec. 101 (BIA 1981).[12]

Although the applicability of Section 212(c) in deportation proceedings has not been recently litigated in any of the decided cases, it may prove difficult to achieve a satisfactory resolution of the conflict in the circuits concerning the computation of time in a Section 212(c) deportation case without reaching this underlying issue. First, the Court may find that the statute cannot sensibly be interpreted without taking full account of *all* of its terms. Yet any interpretation of the statute's reference to grounds of exclusion and its employment of the terms "temporarily proceeded abroad" and "returning to a lawful unrelinquished domicile" necessarily raises the question whether the statute applies to deportation proceedings at all. Second, as noted above, the split in the circuits focuses on when in the course of a deportation proceeding an alien's domicile ceases to be lawful. Although this question should be resolved if Section 212(c) has any application to deportation proceedings, the conflict simply disappears if Section 212(c), properly understood, has no such application.

3. The possible need to consider the applicability *vel non* of Section 212(c) in deportation proceedings in order to resolve this case would not by itself suggest that review of this case is unwarranted. However, the Attorney General has recently undertaken his own thorough examination of this precise question in the context of another case (Matter of Hernandez, No. A17 963 863

[12] The failure of the courts of appeals to give effect to each of the terms of the statute may be understandable. As outlined above, Section 212(c) has undergone a long-and unique history of administrative and judicial construction that has entrenched its application in the deportation setting. Moreover, the litigants themselves have not sought in these cases to raise the underlying issue of whether Section 212(c) is applicable at all in deportation proceedings.

(BIA, Jan. 11, 1990)), discussed below. Because the Attorney General's examination is designed to clarify the Executive Branch's position as to the meaning of Section 212(c) and may precipitate litigation of broader questions concerning the applicability of Section 212(c) in the courts of appeals, we submit that consideration of the issues involved in this case may fruitfully be postponed until the Attorney General, assisted by the Office of Legal Counsel of the Department of Justice, has completed his review.[13]

The conflict concerning the computation of seven years' unrelinquished lawful domicile is not the only difficulty raised by the application of Section 212(c) in the deportation context. Section 212(c) in terms permits admission of an alien notwithstanding the fact that the alien falls within certain excludable categories. See pp. 4-8, *infra*. Prior to this year, the Board of Immigration Appeals had determined that a discretionary waiver under Section 212(c) would therefore be available only to aliens who had been found deportable under a ground of deportation for which there is a comparable ground of exclusion. See, *e.g.*, *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988); *Matter of Granados*, 16 I & N Dec. 726 (BIA 1979); *Matter of Salmon*, 16 I & N Dec. 734 (BIA 1978).[14] In *Matter of Hernandez*, *supra*, a majority of the Board recently reversed this position. The Board held that Section 212(c)

---

[13] Both the Board of Immigration Appeals and the INS, as part of the Department of Justice, are subject to the direction of the Attorney General. 8 U.S.C. 1551 (INS); 8 C.F.R. 3.1 *et seq.* (Board of Immigration Appeals).

[14] But cf. *Marti-Xiques* v. *INS*, 713 F.2d 1511 (11th Cir. 1983) (alien deportable under two separate grounds, only one of which corresponds to a ground for exclusion, is eligible for Section 212(c) relief), vacated, 724 F.2d 1463, rev'd on other grounds, 741 F.2d 350 (11th Cir. 1984).

would continue to be unavailable to waive any ground of deportation corresponding to those grounds of exclusion – generally involving politically undesirability – for which Section 212(c) is unavailable.[15] However, Section 212(c) henceforth would be available to an alien subject to deportation on *any* other ground, including those grounds that do not correspond to any ground of exclusion.[16] In reaching this result, the majority relied on the fact that "section 212(c) as currently applied bears little resemblance to the statute as written." Slip op. 4.

The Commissioner of INS requested that the *Hernandez* decision be certified to the Attorney General for further review. See 8 C.F.R. 3.1(h)(1). The Commissioner requested that the Attorney General undertake a comprehensive reexamination of Section 212(c) as a form of relief in deportation proceedings, and that the Attorney General overrule the many past administrative interpretations that have strayed from the language of the statute. On April 6, 1990, the Board referred the case to the Attorney General, accompanying the referral with a memorandum noting that publication of *Hernandez* was being withheld.[17] As a result of this referral, a thorough study, including briefing of the issues by the *Hernandez* parties, will be undertaken.

---

[15] Because the Ninth Circuit in 1988 had rejected the approach adopted by the Board in *Hernandez*, see *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988), it appears that the Board will not apply the new approach in cases arising in the Ninth Circuit. See *Hernandez*, slip op. 6.

[16] In *Hernandez*, the alien was deportable for having entered the country without inspection, a ground for deportation that has no corresponding ground of exclusion. See Section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2).

[17] We have lodged with the Court and served on petitioner copies of the *Hernandez* decision, the INS request for referral, and the Board's memoranda that accompanied the referral.

The particular issue raised by the *Hernandez* case is different from the particular issue here; there is no dispute that petitioner's potential ground of deportation (8 U.S.C. 1251(a)(11)) does correspond to a ground of exclusion (8 U.S.C. 1182(a)(23)). Yet the issue that the Attorney General has been asked to re-examine is precisely the broader issue underlying this case: whether Section 212(c) has any application in deportation proceedings.

If the Attorney General agrees with the INS that the statute has little or no application in deportation proceedings, his ruling would no doubt be subjected to searching review in future cases in the courts of appeals. This would have several benefits. Perhaps the lower courts would be able satisfactorily to resolve the extent to which Section 212(c) applies in deportation proceedings, rendering it unnecessary for this Court to resolve the question. And if the issue is brought here for review, the Court would consider it with the benefit of recent and thorough administrative and judicial analysis directly on point. Finally, if it were ultimately determined that Section 212(c) is limited to the exclusion setting, the narrow question presented by this case concerning computation of time in cases in which Section 212(c) is applied in the deportation setting would lose any continuing importance.

If the Attorney General determines that an expansive construction of Section 212(c) is appropriate, the Court may still benefit from clarification when the computation of time question arises in other cases. In short, orderly resolution of the larger issues raised by this case would benefit from permitting the Executive Branch in the first instance to complete its own re-evaluation of the statute.

3. A further consideration supports denial of certiorari in this case. As petitioner correctly notes, the Board is not restricted by the immigration judge's action in a case, but rather has *de novo* review authority to make its

own factual determinations from the record (Pet. 11). See *Patel* v. *INS*, 811 F.2d 377, 381 n.8 (7th Cir. 1987); *Cardoza-Fonseca* v. *INS*, 767 F.2d 1448, 1455 (9th Cir. 1985), aff'd on other grounds, 480 U.S. 421 (1987). The immigration judge had permitted petitioner to present his full case for the Section 212(c) waiver, and the Board used its *de novo* review powers to go beyond the question of statutory eligibility and to deny relief in the exercise of discretion.

The Board fully considered the favorable and unfavorable aspects of petitioner's case (Pet. App. 19a-22a). It determined that the seriousness of petitioner's offense was not outweighed by his ties here, nor by his evidence of remorse and rehabilitation. The Board's discretionary denial of relief was well within its authority and was not inconsistent with its actions in similar cases. See *Blackwood* v. *INS*, 803 F.2d 1165 (11th Cir. 1986). Consequently, the result below was proper regardless of the correctness of the court of appeals' rationale. Postponing resolution of the circuit conflict concerning the computation of time is therefore unlikely to have any impact on petitioner's own case.

4. Finally, we submit that if Section 212(c) relief is available to an alien subject to deportation, then the conclusion of the Eleventh Circuit in *Marti-Xiques* and in this case is correct: the alien is eligible for such relief only if seven years of unrelinquished lawful domicile have passed prior to the issuance by the INS of the show cause order. Neither of the arguments advanced by petitioner against the Eleventh Circuit rule is persuasive.

First, petitioner argues (Pet. 8) that *Marti-Xiques* results in a permanent resident's loss of status without notice and a hearing. The decision in *Marti-Xiques* in fact does not extinguish permanent resident status at the time a a show cause order is issued. It simply reflects one reason-

able point in the deportation process at which the accrual of the seven years of domicile necessary for relief should stop.[18] All of the decisions addressing this issue implicitly recognized the need to draw some line; they merely differ on where that line is to be drawn.

Second, petitioner claims (Pet. 16) that using the date of issuance of the show cause order as the cut-off date "leaves the alien's eligibility date up to the vagaries of the administrative process." Petitioner's argument ignores the fact that *any* cutoff point is subject to attack on the ground that it may produce uneven results because of the procedural differences that arise in both the administrative and judicial review processes. The Board and at least the Seventh Circuit agree that an alien should not gain Section 212(c) eligibility by virtue of the delays possible during judicial review of a deportation order. *Matter of Lok, supra*; *Variamparambil* v. *INS*, 831 F.2d 1362 (7th Cir. 1987). The Eleventh Circuit rule merely employs the same reasoning to hold that an alien cannot achieve the necessary seven years' domicile by managing to protract the administrative process. *Marti-Xiques*, 741 F.2d at 355. In so holding, the court quite properly took into account the incentive and opportunities for delay that any contrary rule would create.

---

[18] Cf. *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973) ("rights and obligations of the parties became fixed when the [IRS] summons was served" and were not altered by subsequent transfer of possession of the records sought by the summons).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
LAURI STEVEN FILPPU
Attorney

APRIL 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00859